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REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF ADMIRALTY.

COMMENCING WITH  
THE JUDGMENTS

OF THE  
RIGHT HON. SIR WILLIAM SCOTT.

MICHAELMAS TERM, 1798.

BY CHR. ROBINSON, LL.D.,  
ADVOCATE.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

VOLUME I.

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BOSTON:  
LITTLE, BROWN AND COMPANY.  
1853.



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1853

TO  
THE RIGHT HONORABLE  
GEORGE JOHN, EARL SPENCER,  
VISCOUNT ALTHORP,  
FIRST LORD COMMISSIONER OF THE ADMIRALTY, &c. &c. &c.  
THESE REPORTS ARE, WITH HIS LORDSHIP'S PERMISSION,  
RESPECTFULLY DEDICATED, BY HIS LORDSHIP'S  
OBLIGED AND OBEDIENT  
SERVANT,  
CHRISTOPHER ROBINSON.



## ADVERTISEMENT.

---

IN adding to the very valuable collections of Reports, in the other Courts of Judicature, those of the High Court of Admiralty, during an interesting period of a long and complicated war, I am induced to hope that I offer to the public a work of general utility, and, as such, not unacceptable to many readers.

The honor and interest of our own Country are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly proper to be known here at home, in what manner and upon what principles its tribunals administer that species of law; and to foreign States and their subjects, whose commercial concerns are every day discussed and decided in those Courts, it is surely not less expedient that such information should be given.

With regard to the general fidelity of the work, I am proud to give the reader the security of knowing, that no means of accuracy and correctness, which the kindness of the most experienced of my profession could supply, have been denied to me. Of my own anxiety on this point I will only say, that I consider an inviolable adherence to the very terms of a judicial sentence, *as far as it can be attained*, to be the indispensable duty of a reporter; and that I shall esteem it a great happiness, if any care and diligence that I can use, may avail to correct the misrepresentations to which jurisdictions of this nature are, perhaps, peculiarly exposed.

To the gentlemen of my own Bar I have to return my best thanks for their ready and friendly communications. It is, besides, a duty I owe them, to state explicitly the rules by which I have been guided in exercising a discretion of some delicacy; in omitting altogether, or inserting in a compressed form, a statement of the arguments in the several cases. On *proofs of property*, and on questions of mere

fact, I have usually omitted the arguments—retaining them only in general so far as any position of law, or any reference to authorities, or any general principle came into discussion; and so far as might serve to show the points to which the attention of the Court was principally directed. Under these limitations, I must often run the risk of weakening the force of their observations by my own constrained manner of representing them. I must, therefore, beg their pardon for this liberty, as a public acknowledgment to them, and as an intimation to the reader in what manner he is to consider the statement of the argument in these Reports.

CHR. ROBINSON.

DOCTORS COMMONS.



## ADVERTISEMENT TO THIS EDITION.

---

THIS edition is an exact reprint of the English edition, nothing being omitted. The marginal paging is that of the English edition. The additions and notes made by me are in all cases inclosed in brackets.

GEORGE MINOT.

BOSTON, March, 1853.

**JUDGE**  
**OF THE**  
**HIGH COURT OF ADMIRALTY,**  
**THE RIGHT HONORABLE SIR WILLIAM SCOTT.**

---

**KING'S ADVOCATE,**  
**SIR JOHN NICHOLL.**

**ADVOCATE OF THE ADMIRALTY,**  
**WILLIAM BATTINE, LL.D.**

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## REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF ADMIRALTY.

---

THE *VIGILANTIA*, Gerritz, master.

November 6, 1798.

An enemy's vessel ostensibly transferred, and continuing in the enemy's trade, liable to condemnation, on facts: on law.

THIS was a case of a ship sailing under Prussian colors, and taken 4th May, 1798, on a voyage from Amsterdam to Greenland, laden with stores and other necessary articles for the Greenland fishery.

A claim was given for Mr. Brower, a merchant of Embden.

For the captors, the *King's Advocate* and *Arnold*. This is one of a class of cases in which the Dutch have attempted to protect their fisheries, by transferring to neutral merchants the pretended property of their vessels. Every fact in the case suggests suspicion of fraud. The former owner continued to conduct the concerns \* of this vessel in the nominal character of agent; the [ \* 2 ] former master continued in command; the ship continued in her former trade, and was destined ultimately on this voyage to the same port that had been the constant port of her returns for twenty years; all the parties on whom the claim can rest for support are discredited by their own conduct; the magistrates of Embden have weakened the authority of their certificates by their facility in granting them; Mr. Brower has forfeited his claim to belief, by procuring from these magistrates a certificate of the master's residence, which the master himself contradicts; the master believes the whole to have been a fraudulent transaction; he suspects all the papers to have been colorable, and confesses the muster-roll to be in his own knowledge false.

But, were the transfer real, the law of nations would not justify

such a transaction. There are rights to be maintained by belligerent nations, as well as interests to be pursued by neutrals, and it cannot be required on any principle of justice, that powerful belligerents should concede to neutral nations a right to interpose and rescue from their hands a principal branch of the commerce of their enemies, at the very moment when it is about to fall a certain conquest to the superiority of their arms. On these grounds, as well on defect of title as on principles of law, and more strongly on both, this vessel is liable to immediate condemnation.

For the claimant, *Lawrence* and *Swabey*. The argument for the captors has been directed more against the credit of individuals, than to the merits of the case. With this view a forced and unnatural construction has been put upon some parts of the transaction. The magistrates of Embden have been implicated as parties, and charged with lending their countenance too lightly, when in truth they certify not their own conviction, nor even an opinion, but simply the facts that had taken place, and the particular proof that Mr. Brower had exhibited of his title before them. Their act was merely ministerial, exercised without an option, and without a bias to influence their conduct. Through the whole of this war, neutrals have been allowed so far to avail themselves of the difficulties in which the commerce of belligerent nations becomes necessarily involved, as to purchase their ships. If the purchase of a Dutch vessel was free to Mr. Brower, the Greenland trade lay open to him in common with adventurers of all other nations; and if he resorted to Holland for a market, it was only because that country afforded a better price than could be obtained at Embden or Hamburg. The transaction therefore cannot be impeached on principles of public law. And as to the proofs of the facts of transfer, the most that can be objected on that point, is, that the depositions are in some respects contradictory to the ship's papers. But this objection is again weakened by the loose and inconsistent manner in which the master has made his depositions. These contradictions, however, at the utmost constitute only one of those cases of doubt, in which it is peculiarly the practice of Courts of Admiralty to require farther proof.

[ \* 4 ] \* JUDGMENT.

SIR W. SCOTT. This was a ship sailing under Prussian colors, and taken on the 4th of May, 1798, on a voyage from Amsterdam to Greenland. There was no cargo on board, but the vessel was fitted out with stores necessary for the Greenland fishery. The claimant is Mr. Peter Brower, of Embden; and the cause comes on



to be decided by me, on the only evidence that can regularly be produced in the first instance, on the ship's papers, and the preparatory examinations.

There have been three witnesses examined, the master, the mate, and another seaman; and as some remarks have been made on their credit, I must observe that every presumption is to be entertained, *a priori*, in favor of their evidence. They are persons who have no interest, that I can discover, in the condemnation of this vessel; whatever interest they can have, must be on the other side. They must be concerned to defend their own employment and occupation in this commerce; and they have also the natural prepossession in favor of their employers. I cannot therefore but consider them as witnesses most favorable to the claimant. But the master in particular is said to be discredited, by the contradictions occurring in his evidence; he is represented to have said, "he knows nothing of a bill of sale;" whilst another witness deposes, that "he told him there was a bill of sale." Now I cannot consider this to be a contradiction in any degree important. The master says, the ship had been sold, and therefore he cannot be understood to speak against the existence of a bill of sale. In swearing "that he knows nothing of such an instrument, I consider him to say no more than that he knows not where it was executed, \* or by whom, or before whom, or upon what [ \* 5 ] considerations; he means only to disclaim all particular and private knowledge of it. It is urged against him as another contradiction, that he says, "he had his instructions only from a person resident in Holland;" whilst there appear amongst the ship's papers, two sets of instructions expressly purporting to have been received from Mr. Brower of Embden. But these papers scarcely deserve the name of instructions; they are as general, vague, and formal papers as could possibly be executed; they leave every thing relative to the voyage to be filled up by others. In one of them, a letter from Mr. Brower, bearing date February, 1797, Mr. Brower expresses a general intention of employing his vessel in the Dutch Greenland trade, and assigns his reasons for it, but mentions not a word of money, nor of the course of supplies by which such a trade was to be carried on; the other is also a letter from Mr. Brower, but equally uninformative, and therefore strongly confirms the master in that part of his evidence, in which he says, he was to resort to some other person for instructions; I shall therefore consider this person as by no means discredited by these instructions.

What then is the result of his evidence? He says "he was born in Holland, that he had always been a subject of the Batavian republic, but thinks, from a paper which he received from Embden.

that he is now a subject of the king of Prussia;" he acknowledges, "that he never was at Embden, nor ever took any oath of allegiance to the king of Prussia;" he states, "that he was well acquainted with the ship now called the \* *Vigilantia*; that her name was formerly the *Young Peter*, but it had been changed about two years before he took possession of her at Amsterdam; that she had always been employed in the Greenland trade, and had constantly delivered her cargoes at Amsterdam; that Jean Wart was the owner; that Wart appointed him to the command, and fitted him out for the present voyage; that he sailed by the directions of Wart from Amsterdam, and was to have returned thither, and to have delivered his cargo to him; that he believes none of the papers are true and fair on board the ship, but knows the muster-roll to be false." He says further, "that a sale was made of this vessel, two years ago, by Simeon G. Wart; but that he believes the same to have been only a collusive sale, to conceal the true property; and that, if restored, she will in his belief belong to Wart, and no other person." In this account he is confirmed by two other witnesses, assigning nearly the same reasons for the same belief.

So stands the case on the preparatory examinations; but there are papers on board which speak a very different language; these I shall now consider. The ship must have been transferred in 1796; for the master was examined pretty early in the present year, and he says "the sale was made two years ago;" but the earliest paper is dated February, 1797. It is the letter before mentioned as containing instructions from Mr. Brower to this master. There is also a certificate of the same year, in which the magistrates of Embden certify, "that

Brower had made oath before them, that the ship belonged [\*7] to him as joint \* owner, and that he had made proof of his property by what is called a legal bill of sale." These are the only papers of 1797. In 1798 there is the Embden passport granted to Mr. Brower; there is also a letter from Brower to the master, bearing date the 20th of Feb. 1798, with instructions to follow, as fully as possible, his orders. There is besides a certificate "that Gerritz is a fellow-inhabitant of Embden, he having hired a lodging in that city;" and there is the lease of these premises demised to him from the 1st of March, 1798, to the 1st of March, 1799.

Now, undoubtedly, between these two species of evidence, the depositions and the documents, there is a repugnance; and it is argued, that therefore the conviction of the Court must be kept *in equilibrio*, till it can receive farther proof. I admit this is a general rule of the Court of Admiralty; but it is a rule by no means inflexible; it is liable to many exceptions; the exceptions may sometimes be in favor

of depositions, and sometimes, though more rarely, on the side of the documentary evidence. A case may exist, in which the witnesses may appear to speak with such a manifest disregard to truth, that the court may decide in favor of papers, bearing upon them all the characters of fairness and veracity. On the other hand, it may happen, and does more frequently happen, that the papers may betray such a taint and leaven of suspicion on the face of them, as will give a decided preponderancy to the testimony of the witnesses examined, especially if these witnesses give a natural account of the part they took in the transaction, and in a manner so distinct and clear as to carry with it every degree of moral probability. The propriety of \*this practice will be best illustrated by an ex- [\*8] ample. Let us suppose the case of a ship furnished with documents, before there has arisen any apprehension of a war; there could then be no reason for the introduction of fraudulent papers. Fraud is always inconvenient, and seldom adopted as a matter of choice. Under such circumstances there is no particular ground of suspicion against the documents. But on the other side, suppose that there is a war, or the apprehension of a war, when the documents are composed. Here, in that decided, or in that doubtful state of things, they become subject to some suspicions *in limine*; which suspicion may be increased by their having passed through the enemy's hands. The suspicions will be still further increased, if the property to which they relate has continued under the management and direction of the enemy. And if, in addition to all this, they carry such contradictions or difficulties on the face of them as cannot be explained, admitting the matter to be a fair transaction, all or any of these circumstances must divest the papers of their natural credit. Let us see, then, how the papers in the present case will bear this test. They are papers composed during a war, on the very spur of the occasion; they purport that a ship belonging to the enemy was at that time transferred; but it appears that the management of her concerns still continued in the hands of the former owner; that she sailed from a Dutch port, where she had been confined for want of employment, with an intention of returning to that Dutch port only; that the Dutch master continued in command, and the crew were picked up in the harbor of the enemy. In a \*word, there is no circumstance in the [\*9] whole history of this vessel, which connects her with any neutral ownership, excepting the single averment contained in them, that there had been a transfer.

So much for the external credit of these papers, so far as it can be estimated from all the circumstances with which they are connected. I will now take a view of their internal character. The first paper

is a letter from Brower to the master, bearing date in 1797; it is said to be the proper beginning of the correspondence of an owner, and sets out with stating his intention of employing the vessel, and this man as master, in the Greenland trade;—and if this was the beginning of such a correspondence, we might naturally expect that it would have been followed by a chain of detailed and particular communications; but nothing like it—nothing follows, till in the next year there is another letter from the same person enjoining the master to pursue his directions; but no directions are produced, and the master positively swears, that he received no orders, except from the former Dutch owner. Another paper is the muster-roll, and this is confessedly false; it states the mariners to be all neutrals, when in truth, by the master's own confession, fourteen of them were Dutchmen, picked up at Amsterdam. This instrument then contains a representation that is false, and therefore in some degree lessens the credit of the other papers found on board.

There is another paper also, which I consider to be in the same point of view, very material; it is the lease of the lodging at Embden to the master. In what proportion truth is mixed up in the composition of this document, appears from the confession of the [ \*10 ] master, \*who swears that he never was at Embden in his life; that he never took the oath of allegiance to the King of Prussia; and that he had no knowledge of his pretended employer, Mr. Brower. Connected with this last paper is another, of which I shall find some difficulty to express myself with entire propriety; it is a certificate of the national residence of the master, under the seal of the magistrates of Embden. Now, meaning to speak with all the respect which is due to persons in public stations, I cannot but accede to the observation, that where a magistrate merely certifies that another person has formally appeared before him, and has given such a representation of any fact—the falsehood of that representation founds no imputation against the magistrate who has granted such a certificate. But, on the other hand, consider what that certificate is; the magistrates therein certify, “that the said Jan Gerritz is their fellow-inhabitant, he having hired a lodging at that place;” and they declare, “that they certify this at the request of the said Jan Gerritz.” Yet he himself positively swears, “that he has no acquaintance with any part of the Prussian dominions, and never was at Embden in his life.”

Now in what manner or by what means this certificate has been procured, whether by imposition on the magistrates, or whether by some inaccuracy on the part of the magistrates themselves, it is impossible for me to conjecture; but I must add, that inconveniences

from this kind of conduct may be likely to attach on the inhabitants of that city, if not prevented by those who have the public care of that place, in guarding against practices of such a nature. I should be extremely sorry to suppose that any body of magistrates acted in \*their public conduct with an insufficient sense of [\* 11 ] public duty, and of that guarded honor and integrity which belong to public situations, and without which, the intercourse of mankind in different states cannot conveniently be supported; and I therefore only desire that it may be intimated to the magistrates of Embden, that there is a danger of a surprise on their vigilance in these matters; and that it concerns the public interests of that place, to have that vigilance more laboriously exerted against impositions of this sort; impositions which I must conceive to have been practised upon them; because on any other supposition, undoubtedly I should be under the necessity of expressing myself with less civility than the relation which I bear to the magistrates of other countries would induce me to do. Looking then at these papers, and the conduct of the parties, I feel no scruple in pronouncing, that this ship still continues *de facto* the property of the former Dutch owner; and is, as such, subject to condemnation.

But I will go farther, and for the convenience of applying a ruling principle to some other cases which, I am informed, bear a strong affinity to the circumstances of the present case, I will express my opinion on the abstract question of law. I desire to state my opinion then, subject to the correction of a superior court, that supposing Mr. Brower to be the actual proprietor of this vessel, and resident at Embden, yet this vessel and her concerns (however it may be with respect to other ships, and other concerns in which this gentleman may be engaged) are liable to be treated and considered as Dutch property. In the first place she is a Dutch-built vessel, a Dutch fishing vessel, that \*went from Amsterdam regu- [\* 12 ] larly, and habitually, to Greenland, and to return to Amsterdam, there to deliver her cargo; she is purchased in Holland; she is purchased avowedly for the purpose of pursuing the same course of commerce, the fishing trade of Holland; she is purchased at a time when, it is said, there was a defect of conveniences for carrying on this trade at Embden; but I am satisfied it was the intention of the parties to carry on this trade to and from Amsterdam. Now, I ask upon what grounds is it, that this vessel, so purchased and so employed, is to be considered merely as a Prussian vessel? Here is a ship as thoroughly engaged and incorporated in Dutch commerce as a ship can possibly be; she is fitted out uniformly from Amsterdam; she is fitted out with Dutch manufacture;

she is fitted out for Dutch importation, — in all these respects employing and feeding the industry of that country; she is managed by a Dutch ship's husband, and finding occupation for the commercial knowledge and industry of the subjects of that country; she is commanded by a Dutch captain; she is manned by a Dutch crew, and brings back the produce of her voyage, for the purpose of Dutch consumption and Dutch revenue. If to this you add, that the vessel is transferred by the Dutch, because they themselves are unable to carry on the trade avowedly in their own persons, it is truly a Dutch commerce in a very eminent degree, not only in its essence, but for the very hostile purpose of rescuing and protecting the Dutch from the naval superiority of their British enemy. In my apprehension, unless it could be maintained as a rule, without any exception what-  
 [\* 13 ] ever, that the domicil of the proprietor constitutes the \* national character of the vessel, this ship must be condemned, even if she had been really transferred.

Now on that point, I conceive the rule to be, that where there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the residence of the owner; but there may be circumstances arising from that conduct, which will lead to a contrary conclusion. It is a known and established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of that country. In like manner, and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account of the war, on what ground is it to be asserted that vessel is not to be deemed a ship of the country from which she is so navigating; in the same manner as if she evidently belonged to the inhabitants of it?

Suppose the naval arms of France had been triumphant in her present contest with Great Britain, and that all the British Greenland ships could no longer have been navigated as such from British ports; suppose a neutral country should offer her charitable assistance, and her merchants should say, we will purchase your vessels, but they shall still navigate to Greenland; they shall still continue under your management, and be fitted out in your ports; they  
 [\* 14 ] shall still contribute to the industry of your artificers; \* they shall be conducted by the skill of your own navigators, by the attention of your merchants, and they shall supply your manufactures and revenue; — in my apprehension the enemy would be

justified in saying, "You, the neutrals, are in this transaction mere merchants of Great Britain, your traffic is the traffic of Englishmen; with respect to this commerce, it has all the marks of English commerce upon it, and as English commerce it shall be considered and treated by us." But farther, in considering this case as the case of a Dutch ship, I think I am strongly warranted from higher authority, by the judgment of the Lords of Appeal in a case which is well known in this court, the case of *Zacharie, Coopman & Co.*<sup>1</sup>

There had been a determination, last war, in the case of two persons,<sup>2</sup> one resident at St. Eustatius, the other in Denmark, who were partners in a house of trade at St. Eustatius. The one who resided there forwarded the cargoes to Europe; the other received them in Amsterdam, disposed of them there, and then returned to Denmark. It was decided in that case, that the share of the person resident in St. Eustatius was liable to condemnation, as the property of a domiciled Dutchman; and that the share of the other partner should be restored, as the property of a neutral. There was also a case in this war,<sup>3</sup> of some persons who migrated from Nantucket to France, and there carried on a fishery very beneficial to the French; in that case, the property of a partner domiciled in France was condemned, whilst the property of another partner, resident in America, was restored. From these two cases a notion had been \*adopted, [ \* 15 ] that the domicile of the parties was that alone to which the court had a right to resort; but the case of *Coopman* was lately decided on very different principles. It was then said by the lords, that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately, on the first breaking out of a war, their goods should become subject to confiscation; but it was then expressly laid down, that if a person entered into a house of trade in the enemy's country, in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country. That decision instructs me in this doctrine, a doctrine supported by strong principles of equity and propriety; "that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him." In the present case I

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<sup>1</sup> *The Nancy, Liberty, Essex, &c.*, Lords, April 9, 1798.

<sup>2</sup> *Haasum and Ernst*; *The Jacobus Johannes, Miller*; Lords, Feb. 10, 1785.

<sup>3</sup> *The Osprey, Paddock*; Lords, March 28, 1795.

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The Embden. 1 C. Rob.

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am clearly of opinion that this is altogether a Dutch traffic; and that a ship so employed as this ship appears to have been, is in every respect to be considered as a vessel of that country in whose navigation, under all these circumstances, she was habitually employed.<sup>1</sup> This is a determination which I shall certainly apply to the decision of all those cases which come before me under similar circumstances. If my opinion is erroneous, I am happy to think it will be set right by a much higher authority; but I feel no diffidence in the decision which I have now pronounced.

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[ \*16 ]

\* THE EMBDEN, Meyer, master.<sup>2</sup>

November 6, 1798.

A master's national character is taken from his employment.<sup>3</sup>

THIS was a case of a ship transferred in Holland, under circumstances similar to the preceding case, and taken 4th May, 1798, on a voyage from Amsterdam to Greenland.

A claim was given for Mr. Bauman of Embden.

For the claimant, *Laurence* and *Swabey*. This case is distinguishable from the last in these points: The master is a Prussian by birth; he verifies and confirms the account of his papers, and believes Bauman to be the owner. It appears, also, from a letter on board, that there was in these parties an intention of removing the ship, and her trade, to Embden, the owner's port, as soon as the necessary works could be established there. This intention proves the truth and reality of the transfer; and at the same time destroys all those arguments that, in the case of the *Vigilantia*, were drawn from the continuance of that vessel in the Dutch trade.

For the captors, the *King's Advocate*. These distinctions are im-

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<sup>1</sup> [See the next two cases in this volume. Also, *The Princessa*, 2 C. Rob. 49; *The Rendsborg*, 4 C. Rob. 121; *The San Jose Indiano*, 2 Gall. 268; *The Bernon*, 1 C. Rob. 101, 103; *The Susa*, 2 C. Rob. 251, 256; *The Jemmy*, 4 C. Rob. 31; *The Liesbet Van Den Toll*, 5 C. Rob. 283. As to the coasting or colonial trade see *The Anna Catharina*, 4 C. Rob. 107, n.]

<sup>2</sup> [Affirmed on appeal, Feb. 10, 1800.]

<sup>3</sup> [See note to *The Vigilantia*, 1 C. Rob. 15.]



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The Embden. 1 C. Rob.

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material; the fate of the ship must depend on her actual employment rather than on the vague and remote intentions of the pretended owner; the sincerity of these intentions is, besides, very much discredited by directions which appear to have been given, that this vessel should, under all events, return to Amsterdam; as, in case of an unsuccessful voyage, it is said, "the pretended owner had formed a design of selling her again."

\* JUDGMENT.

[ \* 17 ]

SIR W. SCOTT. The question which I am to consider is, whether the distinctions which have been pointed out, are sufficient to take this vessel out of the law which has been laid down in the preceding case?

The first distinction is taken from the master's national character; but I think he has scarcely a right to be considered as a Prussian subject. He is a single man who has established no domicile by family connections, and in his own person he has been employed constantly for ten years in trading from Amsterdam to Greenland; by such an occupation he is divested of his national character, and becomes by adoption, a perfect Dutchman.

That there has been a transfer of some kind is not denied, but yet the master can go no farther than to assert a belief only that the ship is the property of Bauman; and because the persons employed about her in Holland told him so. It is indeed strange that persons making these purchases in an enemy's country, should act with so little caution, as not to make the master so far acquainted with the transaction, if it is a fair one, as to enable him to corroborate and verify his papers from a real knowledge; and it is scarcely reasonable to expect that we, sitting here to examine their title, should give full credit to a claim which their own master cannot confirm farther than by a cautious belief. The defects in this case are not merely simple omissions, but go to the very substance of the transaction. The master cannot verify; the second witness is in the same state of ignorance; but the third actually asserts his belief that the ship is the property of Hackman, the person from whom the master allows he received all his papers.

\* Amongst the documents there is no bill of sale, nor even [ \* 18 ] a copy exhibited; and the papers which do appear are exposed to the same observations that I was compelled to make on the documents of the preceding case. There is a certificate of the master's residence at Embden, procured by Bauman, but contradicted by the master's own confession; for he states, "that he never was at Embden, and that he is totally unacquainted with Mr. Bauman," his pretended employer.

On the other side it is said, there are instructions which sufficiently remove the imputation of a continued, habitual occupation in the Dutch trade. It is to be observed, however, that the truth of these instructions is not a little impeached by the false certificate, which the writer, Mr. Bauman, is allowed to have put on board, respecting the residence of the master. But if this objection was removed, what proof would they afford? The master received them by the post; they are dated Embden, yet the master will not venture to say from what place they came. The contents discredit them, as they give only a barren order to go to the fishing parts, to stay there the usual time, and then to return. As a letter from a real owner to a confidential agent, the master of his vessel, nothing could be less instructive. This letter farther states the intentions of the owner to remove his trade to Embden in the ensuing year, when proper accomodations could be prepared. But I have observed in the last case, these speculations on the Dutch fishery had been commenced two years at this time, and as to the intimation contained in this letter, that in the next year this trade would be particularly privileged by the [ \* 19 ] king, it is no excuse, if true, for \* the intermediate continuance in the Dutch trade, and does in no degree apply to the present actual employment of this vessel.

It is, besides, a little inconsistent with the sanguine expectations entertained of the privileges which this trade was to receive at Embden in the ensuing year, that the projector of these schemes should resolve to sell his ship again immediately, if she should prove unsuccessful in her first voyage.

I have this fact then against the future intention of the claimant; the ship still continued in the Dutch trade; the former master continued to command; the return was to be under all events to Amsterdam; the defects of proof are not, as I have said, simple omissions only, but fatal imperfections; they are inconsistent with any idea of a fair transaction. I am unable to distinguish this case from the circumstances of the preceding case, and therefore under the same principles, I must pronounce this vessel subject to condemnation.

Sentence affirmed on appeal, before the Lords Commissioners of Appeal in Prize Causes, February 10, 1800. Costs were prayed,—but the Court refused to give costs, considering it as an appeal to try the general question of law, on this class of cases.

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The Young Jacob and Johanna. 1 C. Rob.

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THE ENDRAUGHT, Broetjas, master.<sup>1</sup>

November 13th, 1798.

Where a ship is transferred from an enemy, and continues habitually in the enemy's trade, the neutral is not specially entitled to carry on that trade, merely because his own country has no seaport.

THIS was a case of a Dutch ship transferred under circumstances similar to the last case, but taken 10th August, 1798, on her returned voyage from Greenland to Amsterdam, with a cargo of whale blubber and fins. The ship and cargo were claimed for a merchant of the dutchy of Oldenburg.

For the claimant, *Lawrence*. A material distinction arises in this case, from the residence of the owner.

\* Oldenburg has no port to which the vessel could return [ \* 20 ] as to her home; the owner was under the necessity of using some foreign port, and therefore a return to Holland cannot in this instance afford an inference to impeach the fairness of the transaction.

JUDGMENT.

SIR W. SCOTT. I think this case comes under the range of the principles which I have laid down. If the claimant, from views of interest, chose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of such a speculation. Though he had no seaport of his own, the ports of other neutral countries were open to him; and if he confines his vessel exclusively to the enemy's navigation, he is liable to be considered as an enemy, with respect to the concerns of such a vessel.

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THE YOUNG JACOB AND JOHANNA, Visser, master.

November 13th, 1798.

Forbearance towards common fishing boats has been a matter of comity in former wars. In this they have been proceeded against, and condemned.

THIS was a case of a small Dutch fishing vessel taken April, 1798,

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<sup>1</sup> [See note, *ante*, p. 15.]

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The Young Jacob and Johanna. 1 C. Rob.

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on her return from the Dogger Bank to Holland, and claimed for Messrs. Abag & Co. of Embden.

JUDGMENT.

SIR W. SCOTT. In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule<sup>1</sup> of comity only, and not of legal decision; it has prevailed from [ \* 21 ] views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this Court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.

But it has been argued in distinction, that vessels of this kind have no decisive character arising from destination, or from the port of their return; they come, it is said, frequently to this country, and resort indifferently to any port that will afford them a market. When a case shall occur of a vessel so destined, occasionally, to the ports of this country, it will be time enough to consider by what rule it is to be governed;<sup>2</sup> but all the facts of this case point so entirely to Holland, that I have no hesitation in pronouncing, that it falls under the authority of the principles which I have laid down in the late class; and is therefore subject to condemnation.

It is a farther satisfaction to me, in giving this judgment, to observe, that the facts also bear strong marks of a false and fraudulent transaction.

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<sup>1</sup> This has been an indulgence of ancient date. Vide, Order of H. IV. A. D. 1403 and 6. Rym. Fæd. vol. 8, p. 336 and 451. The French Ordinance of the year 1543, gave the Admiral a power of forming fishing truces, trêves pêcheresses, with the enemy during hostilities; or of granting passports to individuals, to continue their fishing trade unmolested; this practice prevailed so late as the time of Louis the XIVth. They have since fallen into disuse, "owing to the ill faith with which they were observed by the enemies of France." Valin, liv. 5, tit. 1.

But the indulgence was renewed again between the two countries in the last war. Arrêt du Conseil du Roi, 6 Nov. 1780. "Fait sa Majesté défenses à tous armateurs, d'inquiéter en aucune manière, les Bâteaux-Pêcheurs Anglois, qui seront sans armes offensives, &c. à moins qu'ils ne soient convaincus d'avoir fait quelques signaux, qui indiqueroient des intelligences, avec les corsaires ou bâtimens ennemis." Code des Prises, An. 1784, p. 903.

Valin speaks of them as exceptions of comity only, "en derogant en cette partie au droit de la guerre suivant lequel les pêcheurs sont de bonne prise comme les autres navigateurs."

<sup>2</sup> [The Liesbet Van Den Toll, 5 C. Rob. 283.]

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The Endraught. 1 C. Rob.

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\* THE ENDRAUGHT, Bonkins, master. [ \* 22 ]

November 19th, 1798.

A Dutch ship ostensibly transferred to a neutral, condemned.<sup>1</sup>

A description of contraband, and exceptions under the Danish treaty.

THIS was a case of a ship, taken 9th January, 1798, on her voyage from Narva to Dort, in Holland, with a cargo of barks, fir planks, battens, and fire-wood.

A claim was given for the ship and cargo, as the property of Danish subjects.

For the captors, the *King's Advocate*. In respect to the ship, this case must turn chiefly on the facts of a transfer; and on a reference to those principles which have been laid down, respecting the purchase of enemy's vessels, and their continuance in the enemy's trade, it is allowed, this vessel has been the property of a Dutchman, and is said to have been by him transferred to the claimant.

A bill of sale has been produced; but this document is discredited by the master's evidence, who says, "he believes it to be collusive, and executed only for the purpose of covering the property." The ship had never been removed from Dutch commerce, and her return on this voyage was to have been to Holland. With respect to the cargo, that is clearly confiscable, under the Danish treaty.<sup>2</sup> By that treaty is declared, "all articles which serve directly for the building of ships, unwrought iron and fir planks excepted, shall be deemed contraband." The balks, therefore, being squared firs, not sawed into planks, and applicable to ship-building, do not come under that exception, and are to be considered as contraband; for it is not necessary to bring timber under the terms of that treaty, that it should be so peculiarly adapted \* to the purposes of [ \* 23 ] ship-building, as not to be applicable also to other uses.

For the claimant, *Laurence*. There are many points of distinction

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<sup>1</sup> [For other cases of transfers, adjudged fraudulent on facts, see *The Staat Embden*, 1 C. Rob. 26; *The Bernon*, lb. 102; *The Welvaart*, lb. 122; *The Juffrow Ellbrecht*, 1 C. Rob. 127; *The Omnibus*, 6 C. Rob. 72; *The Two Brothers*, 1 C. Rob. 131; *The Odin*, 1 C. Rob. 248.]

<sup>2</sup> Additional article between Great Britain and Denmark, July 4, 1780, explanatory of Treaty, 1670.

in favor of this ship; she is not Dutch built; the master is not a Dutchman; the mariners are none of them Dutchmen; the pass in this case was granted for a voyage to Hamburg and Amsterdam, and, therefore, there was no pretence to say this vessel has been continued invariably in Dutch commerce. Amongst the documents there is a bill of sale particularly full and specific, and although the master attempts to discredit it in his evidence, he can assign no reasons for his opinion, and, therefore, a bare unsupported suspicion is not evidence that ought to be received.

With respect to the cargo; the construction which has been put upon the Dutch treaty is an interpretation perfectly new; the words "directly serve" were intended to describe accurately such timber as is in its nature more particularly applicable to the uses of ship-building; it would indeed be difficult to find any wood that might not be useful for some inferior purposes of ship-building; but by this term was meant specifically such timber as is most generally employed for that purpose. These balks are of the length of only thirty feet, and out of two or three thousand there are only fifty of the length of fifty feet. No precedent has been cited, in which balks of such dimensions have fallen under this construction; whilst, on the other side, some instances have occurred in which such timber has been restored, after a reference, as to its use, to the judgment of persons employed in our navy yards.

#### JUDGMENT.

[ \* 24 ] \*SIR W. SCOTT. The question which I am to determine is, not whether this case is in all its circumstances exactly similar to former cases, but whether in the leading points, there are any characteristic marks, on which I can form a belief that this vessel is not Dutch property.

The course of her trade is from a Dutch port and back again to Holland; the crew, whether Dutch or not, were all picked up in a Dutch port; the master I must consider as a Dutchman; for although he was by birth a Dane, and although he may have a wife and family resident in a neutral country, yet his own personal occupation has always been in Dutch trade; and, therefore, under the general rule that mariners are to be characterized by the country in whose service they are employed, I must consider him as a Dutchman.

Besides, it is observable that he has never held any correspondence with Embden, but only with persons at Amsterdam; although there is a certificate of his domicil at Embden, there is no proof that he ever lived there a day; and, from the course of his employment, I think I may conclude he in fact never was there.

Is it a nominal residence then, that can entitle him to be considered as a citizen of Embden, under the magistrate's certificate only? Surely the magistrates themselves will not expect me to be satisfied with this sort of proof. The residence which the court requires, must be taken up honestly, with a *bond fide* intention of making it the place of habitation; without such an actual residence, a certificate \*like this rather weakens than assists the case. [ \* 25 ]

There is also, it is said, a bill of sale, but it is entirely unsupported, and is only a part of the machinery of the drama; the master himself confesses he believes the ship to be Dutch property; but, it is said, he has no grounds for this belief. In my opinion the whole of the transaction and every fact in the case strongly supports this belief. I consider the master's deposition to be confirmed by the other evidence; and I condemn the ship as Dutch property.

With respect to the cargo, on the question of property, I should require farther proof; and I must observe, on one of the papers, which is a certificate on the oath of the shipper, that the court can never admit such *à priori certificates* to be any proof of the real property.

But there is a preliminary question which may make this discussion of property unnecessary. The nature of the cargo may perhaps decide this case; it is asserted to be "a cargo of ship-timber going to an enemy's port of naval equipment;" and under this description to come under the character of contraband. This I consider to be the correct law of nations,<sup>1</sup> notwithstanding some relaxations which may occasionally have been allowed.<sup>2</sup>

But besides the general law of nations, there is an express treaty between this country and Denmark, which declares, "that ship-timber, fir planks excepted, shall be deemed contraband." With respect to the true character of this timber, and the fair application of it, I do not seem to be in possession of sufficient facts to govern my decision; \* I shall therefore refer it to the principal persons employed in making repairs for ships or vessels belonging to government at Yarmouth, where this cargo lies, to certify their opinion, whether this is properly ship-timber; if there are no such persons at Yarmouth, the opinions of respectable shipwrights there must be taken upon it; and the court will judge upon their report of its nature and quality.

<sup>1</sup> [The Stadt Embden, 1 C. Rob. 26; The Twende Brodre, 4 C. Rob. 33. For a reference to treaty stipulations of the United States respecting contraband, see note to The Neptunus, 6 C. Rob. 403.]

<sup>2</sup> [The Apollo, 4 C. Rob. 158.]

## THE STAADT EMBDEN, Jacobs, master.

November 19, 1798.

A prize-ship carried by the French into Norway, there ostensibly sold to a neutral; adjudged on facts not to have become the property of the neutral. Masts are contraband. Contraband articles affect innocent parts of the cargo belonging to the same person.<sup>1</sup>

THIS was a case of a ship which had been a prize-ship, taken from the English, and carried into Christiansund. A pretended sale had passed there, and the vessel was retaken on a voyage from Riga to Amsterdam, laden with deals and masts.

A claim was given for the ship, as the property of Mr J. Bauman of Embden; and for the cargo, as the property of merchants of Riga.

For the captor, the *King's Advocate* and *Croke*. The property of the former British owner has never been divested. The transfer, which is pretended to have passed, appears false and fictitious under the particular facts of this case; but even on principles of law it is null and void; as the transfer of a prize-vessel carried into a neutral port, and sold without a condemnation or the authority of any judicial proceedings. But, were it necessary to discuss the

[ \* 27 ] facts, the fraudulent nature of the transfer would sufficiently appear from this circumstance, that the sale passed under the direction of the Batavian consul at Christiansund; and the payment was made by bills drawn on Zuirmuller, the person to whom the capturing privateer belonged.

[COURT. That circumstance is decisive; I shall trouble you no further on the ship.]

With respect to the cargo, it was argued, it consists of naval stores, bound to an enemy's port of naval equipment; and comes, therefore, under the character of contraband.

For the claimant of the cargo, *Arnold*. This cargo is at most but of a mixed description; the deals must at any rate be separated from the masts; but, since the modern practice has relaxed the ancient law, and allowed merchants to traffic with the produce of their own country, although serving for purposes of war, the whole of this cargo is free; for the articles were all of the produce of Russia, and shipped

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<sup>1</sup> [The *Ringende Jacob*, 1 C. Rob. 91, n.]



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The Staat: Embden. 1 C. Rob.

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by Russian merchants, for their own account. On this point there is the authority of a case decided in the last war,<sup>1</sup> in which an attempt was made to confiscate some hemp, the cargo of a Dutch ship, and claimed as the property of a Prussian subject; it was there contended, that in order to entitle them to the indulgence of the relaxation, neutrals must make these exports only in vessels of their own country; the hemp was restored however, and that restitution, on appeal, was afterwards confirmed.

\*The *King's Advocate* replied. No distinction can be [\* 28] made between the articles of this case, because they are all the property of the same claimant; for, although a mixture of contraband articles may not affect other innocent articles, the property of a different owner, it contaminates every part of the cargo belonging to the same person, and makes it subject to confiscation.

The case which has been cited on the other side, goes by no means to the whole extent of this case; because there the vessel was neutral; and in this case it would be necessary to maintain, that a neutral may load contraband articles, if they are the produce of his own country, on board an enemy's vessel, and send them even to a naval arsenal of the enemy, without molestation.

#### JUDGMENT.

SIR W. SCOTT. This is a British vessel, carried as prize by the enemy to Norway, and purchased, as it was pretended, on behalf of Mr. J. Bauman.

If we look to the origin of the transaction, and trace the steps of it, it will appear, I think, that this vessel still continues the property of Zuirmuller, the owner of the French privateer.

The master says, "that he was sent by Zuirmuller from Amsterdam to Bauman." Zuirmuller therefore is the first mover in this affair. The master says farther, "that he afterwards went on to Christiansund, with a commission to purchase this vessel, and draw for payment on Zuirmuller; and that he cannot swear he believes such purchase to have been truly made." I think I can see in these half expressions a very full confession of his \*belief that it [\* 29] was a fraudulent transaction; especially as we find the other witness deposing, "that they had heard the master say that Zuirmuller was the owner." This seems to have been the general understanding.

It does not appear that the vessel ever went into the management

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<sup>1</sup> The *Jonge Pieter*; Lords, April 24, 1783.

of Bauman; his claim therefore must be rejected; but the ship must be sold, and after payment of one eighth of the proceeds for salvage, seven eighths must be brought into the Court, there to abide the event of any claim which may be given within a year, by persons asserting themselves to be the former British owners.

With respect to the cargo, there is no sufficient proof that it belongs to the Russians, for whom it is claimed; but if it did, it is contended to be of the nature of contraband; and most clearly the masts are liable to be so considered, in the judgment even of the most zealous advocates of neutral commerce. As to the relaxation in favor of the export of native produce, said to have been sanctioned by a determination upon Prussian hemp, in the case of the *Jonge Pieter*, I am by no means disposed to consider that case as laying down any such universal principle.<sup>1</sup>

There have been many cases, in which native articles going to the enemy's ports on the account of inhabitants of the country which produced them, have been treated as contraband. In the famous case of the *Med Good's Hielp*, *Soderberg*, a cargo of pitch and tar, going on Swedish account from Stockholm to Port Louis, was condemned;<sup>2</sup> that condemnation was afterwards confirmed by

[ \* 30 ] a solemn judgment of the \* Lords, and the manuscript note which I have of that case, expressly states it to have been condemned by the Lords of Appeal on the ground of contraband.<sup>3</sup>

It certainly does not aid the Russian claimant in this case, that the cargo is going to a country, against which his sovereign is exercising hostility. That Russia is in a state of war with Holland, is more than I can venture to assert, no declaration to that effect having formally announced it; and, therefore, if this was a cargo of a perfectly inoffensive nature, on the account of a Russian, it might, perhaps, be too much for this court to confiscate it upon the ground of a trading with the enemy of his sovereign;<sup>4</sup> at the same time it is to be remarked that Russia is the declared public enemy of the French Republic, the patroness and ally of the present government of Holland; that the fleet of Russia is immediately coöperating with the fleet of Great Britain in the blockade of Amsterdam; and, though an auxiliary fleet is not of itself sufficient to make its government a principal in a war, yet where captures are made and prizes are claimed by that auxiliary force, as taken from a common enemy, which has been repeatedly done in the present Dutch hostilities, it is

<sup>1</sup> [See *The Appollo*, 4 C. Rob. 158.]

<sup>2</sup> *Adm.* 1747.

<sup>3</sup> *Lords*, June 30, 1750.

<sup>4</sup> [*The Nayade*, 4 C. Rob. 251.]

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*The Magnus.* 1 C. Rob.

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not easy to discover the grounds on which the government to which the auxiliary fleet belongs can be considered as entirely neutral.

Adverting, therefore, to all circumstances, considering that this is a shipment of naval stores to a port of naval equipment under possession of the French, and that Russia is engaged in declared hostilities against France, I shall condemn this cargo as contraband, and I shall \*make no distinction.<sup>1</sup> The statement of the [ \* 31 ] King's Advocate is in my opinion the law of nations, upon this point. To escape from the contagion of contraband, the innocent articles must be the property of a different owner.<sup>2</sup>

I shall therefore condemn the whole cargo.

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THE MAGNUS, Sorensen, master.

November 20, 1798.

Switzerland, and interior countries, are allowed to export and import through an enemy's ports: but strict proof of property is required. In doubtful cases, orders and the mode of payment are points necessary to be proved.

THIS was a case of a ship laden with coffee and sugars, and taken on a voyage from Havre to Genoa. The ship had been restored as Danish property, and the cargo had been referred to farther proof by plea and proof, on a claim given for Mr. D. Merian, a merchant of Basle in Switzerland.

#### JUDGMENT.

SIR W. SCOTT. This is the case of a neutral ship destined from Havre to Genoa. The principal question arising in it, respects the property of the cargo—whether it is to be considered as belonging to the claimant Merian, or to some persons resident in France.

The account which the master gives of his knowledge of the trans-

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<sup>1</sup> [The *Mercurius*, 1 C. Rob. 80, 85; The *Sarah Christina*, 1 C. Rob. 237, 242; The *Neptunus*, 6 C. Rob. 403, 409; The *Charlotte*, 5 C. Rob. 275; The *Immanuel*, 2 C. Rob. 196; note to The *Ringende Jacob*, 1 C. Rob. 91. As to dispatches, see note to The *Caroline*, 6 Rob. 465.]

<sup>2</sup> Bynkershoek, through the whole of his 12th chapter, strongly vindicates this principle, "*Sed omnino distinguendum putem, an licitæ et illicitæ merces ad eundem dominum pertineant, an ad diversos, si ad eundem omnes recte publicabuntur, ob continentiam delicti.*"—Bynk. Q. J. Pub. b. 1, c. 12.

action, goes a very little way; he says, "his ship was chartered by a person living in France, who told him, he took it up for the [ \* 32 ] service \* of a Swiss merchant; but more than this he knows nothing of the matter." The variation between Abel and D. Merian, which the master made in filling up the bill of lading, is, I think, not sufficiently explained.

This was the state of the case on the first hearing; and it was highly reasonable to require farther proof of some sort or other; the order which has been made, has given each party an opportunity of stating his case in a distinct allegation, and has called on him to support it by the best proof the nature of his case can afford.

Perhaps it would not be going too far to say, that in Swiss cases it would not be unreasonable to require proof rather of a stricter nature than what is usually deemed sufficient in ordinary cases between maritime nations; and I say this only in reference to the situation in which the Swiss stand, in being obliged to trade chiefly through other countries, and often, as in this case, through the ports of the enemy. The privilege of carrying on trade in this manner, in time of war, has been allowed to them in common with some of the interior countries of Germany, in consideration of the hardship that they would sustain, were they to be altogether restricted from becoming merchants, for the supply of their own wants, or for the export of the manufactures and native produce of their own country.

But neither of these instances will extend to support the pretensions of this claimant. He has gone much farther, he has been trading in articles of France, without a reference to any wants of his own country; and he appears here only in the character [ \* 33 ] \* of a general merchant interposing to carry on the trade between France and Genoa with security.

I will not, however, at present make this a question, nor say how far in a fair transaction a Swiss might be allowed to stand in the place of a French merchant, and trade in this manner; it might, I think, be attended with some difficulty to establish such a privilege; but at present I will suppose it to be allowable; it must however on all sides be conceded, that on the fairest terms, such a trade would be exposed to great suspicion; and, therefore, we may be justified in requiring more than ordinary proof.

In this case, the proof that was required was of the most solemn nature, by plea and proof. But I will suppose it had been ordered only in general terms; even then what sort of proof should we have expected? Not merely a test affidavit. Considering the distressed state of the trade of France, and the shifts to which the French were reduced to carry it on, we could not have been satisfied with bare attesta-

tions; the correspondence of the parties, the orders for purchase, and the mode of payment, would have been the points to which the Court would have looked for satisfaction.

In this case therefore, where proof of a more solemn nature had been ordered, it could not be expected that less than ordinary proof would be received. Plea and proof is an awakening thing; it admonishes the parties of the difficulties of their situation, and calls for all the proof that their case can supply.<sup>1</sup> They should have proved the orders and the payment; these might have been sufficient; without these, all proofs of a secondary nature must fail to give that satisfaction \* which the Court is entitled to demand. [ \* 34 ]

Nor can the parties themselves think us unreasonable. Aware of the justice of these expectations, they have framed the first article of their plea to give this information; it is pleaded, "that Girarde purchased on commission for Merian;" but not a word of evidence is produced to support this assertion, nor is the defect in this material article in any degree counterbalanced by proof on the next great point,—the mode of payment. Payment to Girarde is not even alleged; but the explanation is, that payment was made by bills, partly on a French house, and partly on Merian. But when this point is still farther investigated,—when it is asked, were these bills paid? all the answer that we can obtain is merely argumentative. "They must," say the witnesses, "have been paid, or the goods would not have been sent." In the same evasive strain are our inquiries answered on the former point. When it is asked, "Did Girarde purchase these goods for Merian?"—"Yes," say the witnesses, "as we have seen by the books and writings." But where are these books? and what are these writings that they cannot be produced? The correspondence between Merian and D'Orange is freely exhibited; but not a word appears of all the letters that must have passed between Merian and Girarde. D'Orange, through the whole of the transaction, appears but as a middle man. The case, even if most fraudulent, would have supplied this sort of proof, and must have run nearly in the same course.

Indeed the defects in this case are exactly similar to those that occurred in *The Active*,<sup>2</sup> Blair; a suspicion in that case arose, that Mr. Brown the claimant, \* was but an instrument [ \* 35 ] to convey the produce of the French colonies to France. Much evidence was produced, but it never reached the origin of the

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<sup>1</sup> [As to "plea and proof" see Letter of Sir Wm. Scott and Sir John Nicholl to Hon. John Jay, *post*, p. 390; *The Sally*, 1 Gall. 401, 403; *The Adriana*, 1 C. Rob. 313.]

<sup>2</sup> *Lords*, March 10, 1798.

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The Magnus. 1 C. Rob.

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transaction; the fact of purchase was never proved; and in that case the defect was deemed fatal and conclusive.

But it is said, in this case, the defect arises from the forms of our proceedings, from those rules of practice which refuse a requisition to examine witnesses in France.<sup>1</sup>

This excuse would indeed be entitled to much attention, were it a point capable of no other proof than the testimony of Girarde; but there must have been documents also to this effect in the possession of the claimant. "He is dead," it is said;—but his books survive, and it is not pretended that they are destroyed. If the transaction therefore was ever bottomed in truth, as an adventure of considerable value, it must have been attended with all the forms of mercantile proceedings; it must have appeared in Merian's books. Till some account is given of these, it can be no cause of complaint that we do not permit a party to resort to France for that proof which his own counting-house ought to supply.

Thus stands the case on defect of evidence; and condemnation, it is urged, must necessarily ensue. Total defect of evidence is certainly, on the general rule, a legal ground of condemnation, especially where the party has been indulged with the opportunity of supplying the defect. But it is always a painful thing to the  
[ \* 36 ] Court to decide on mere defects; \* they arise sometimes from ignorance, from negligence often, or perhaps from accident.

On mere defect, it would have been with great pain that I should have proceeded to condemn so considerable a mass of property as is involved in these causes; it would relieve me from this anxiety, to find also in addition to these defects, some affirmative proofs of fraud. I have therefore looked into the case with this view, and I think it is a case which will afford me that satisfaction. Mr. Merian appears to have been a very young man, not established in any house of trade till the commencement of the present war in 1793; he appears also to have been frequently in France; he must have had opportunities, therefore, of becoming acquainted with the distresses of French merchants, and their want of some such assistance as his, to screen their trade. The extent of Mr. Merian's mercantile engagements must have been very great; yet it is said, as an excuse for producing no more witnesses, "that he had but one clerk, and that this person cannot now be found;" his books, however, as I have before observed, if indeed there were any books, must have been preserved; there is, besides, no trace of any insurance. All these suspicious circumstances

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<sup>1</sup> [The Diana, 2 Gall. 93.]

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The Aquila. 1 C. Rob.

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fairly justify me in looking to a former case, in which something has appeared respecting this gentleman. In the case of *The Molly* before the Lords of Appeal,<sup>1</sup> there was exhibited a certificate of Abel Merian, the father, in which he swore, "the property of the cargo in question belonged to his son;" in this case the same gentleman swears, "he knows nothing of the mercantile transactions of his son."

Thus stands the whole case. On a view of all these [ \* 37 ] symptoms of fraud, in addition to defects of evidence, I think I should be fully justified in pronouncing it subject to condemnation. I should still, however, feel reluctant to condemn so large a property, if I thought there were any means of obtaining farther information; but I fear there are none.

If the experience of the counsel can furnish any instance in which a second reference has been made for farther proof, after the cause had undergone a trial of this nature by plea and proof, I should be glad to be informed of it; if the Lords of Appeal think they can go beyond the forms of this Court, and admit farther proof, I cannot say I should regret it; but I fear I cannot make such a deviation from the established rules of practice.

Condemnation—but suspended to search for precedents on this point; December 3—condemnation final, no precedents being produced.

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### THE AQUILA, Lunsden, master.

November 27th, 1798.

The rate of salvage on derelict is in the discretion of the Court; the ancient rule of granting a moiety *de jure* to the finder has been overruled by the practice of the century.

THIS was a case of a ship and cargo found derelict at sea; the destination appeared to have been from Cadiz ostensibly to Ham-  
burgh; but in fact, as there was great reason to believe, to Amsterdam; the ship had been restored as Swedish property; the cargo had been condemned as unclaimed.

The cause now came on upon a reserved point, respecting the title to the condemned goods; and the proportional merits of different salvors.

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<sup>1</sup> November 21, 1795.

[ \* 38 ] \* For the original finders, *Laurence* and *Swabey*. The original finders in this case are not to be considered strictly under the character of salvors; that term applies in common acceptance to cases of a very different description. In cases of salvage there is no dereliction of property; salvage consists in assistance given to friends, or in rescue made from an enemy, actually in possession; this case falls more properly under the principles of general law, and more especially under those rules of the civil law, by which a title in such things as are *bona vacantia*, is acquired by the occupancy of the first finder. It appears, however, that under the ancient practice of this Court, and, as it is submitted, under the true rule of this country, goods found derelict at sea, have been divided by moieties, between the finder and the crown; this practice is supported by very ancient authority. Inquisition taken at Queenborough, anno 1375, 2d April, 45 Edward III., with additional articles entered in the Black Book of the Admiralty, No. D. Art. 23<sup>1</sup> and 74.<sup>2</sup> Also another ancient inquisition translated by Rowghton into Latin. These records seem to establish a moiety of the thing recovered to be of right due to the finder, and forfeited only by concealment.

[ \* 39 ] The more ancient forms of practice in the \* Registrar's Book recognize this share also as a matter of right. After condemnation to the crown, a monition issued against all persons in whose possession the goods remained, "to bring the same into the registry, that they might be divided according to law between the finder and the crown:<sup>3</sup> ad effectum ut inter dominum nostrum regem et eadem huic curiæ presentantes juxta jura dividantur: et si forsan aliquis vel aliqui vendiderunt vel vendidit eorum aliqua, tunc ad introducendum mediam partem proventus, ad usum dicti domini regis."

At what time this form ceased to be used, or whether the ancient practice was overruled on argument or not, nowhere appears; but notwithstanding an alteration may have taken place in the forms of the court, and the proportion of a moiety may not in later times have been decreed *de jure*, it has still continued to be the favored proportion, and the exceptions to it have been but very few. With respect to the second claimants, they can have no claim as finders; they can-

<sup>1</sup> "Item: soit enquis de toutes nefz, vesseaulx, ou bateaulx qui sont trouvez waif sur la mer, dont l'Admiral n'a eu sa part à lui due d'office, c'est à dire, la moitié."

<sup>2</sup> "Item: pour prendre duement et receyver ce que de droit appartient à l'Admiral, de flottesyn, waif, deodant, getesyn, & wreck de mer; cestassavoir la moitié et l'autre moitié à regard d'icelles au trouveurs, pour leur travail."

<sup>3</sup> Decree, July 13, 1683.



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The Aquila. 1 C. Rob.

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not pretend to be considered as salvors; whatever remuneration they may deserve, it must be given to them in the nature of payment for labor and service; they cannot participate in the higher claims, which, it is submitted, have been acquired to the first occupants in this case on other grounds.

*Arnold and Sewel*, for the crew of the second vessel.

For the Crown, the *King's Advocate*. The pretensions of the original finders in this case are wholly unfounded. Whatever may be the title by occupancy in a state of nature, it can have no place here; the law of this country has long ago assigned [\*40] the property of goods so situated to the crown. It is an axiom of law so clear, and established by ancient statutes,<sup>1</sup> that it is unnecessary to enter into any argument to support it; the claimant indeed will not venture to assert a distinct legal property in these goods; but it is insinuated, that there is a certain proportion of reward, so established by practice, and so fixed as a rule, that if it is admitted, it must produce the same effect. But no traces of this practice can be discovered later than the times of Charles II. The forms of practice that have been cited are of that reign. The extract which has been relied upon is from a sentence in the year 1683. It cannot be denied that an alteration has taken place in practice since that time; for a variety of precedents may be produced to show that a different rule has prevailed during the present century, by which the reward has always been apportioned to the merits of each separate case; indeed, an indiscriminate fixed proportion would have in it something of absurdity. It is submitted, therefore, that it is under this reformed practice that the court will exercise its discretion on the particular services of the several claimants in the present case.

#### JUDGMENT.

SIR W. SCOTT. This is a case of a ship and cargo found derelict at sea, and certainly it is a case of legal derelict;<sup>2</sup> for it is by no means necessary to constitute derelict, that no owner should afterwards appear. It is sufficient if there has been an [\*41] abandonment at sea by the master and crew, without hope

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<sup>1</sup> 3 Edw. 1, c. 4; 17 Edw. 2, c. 11.

<sup>2</sup> [As to what will constitute derelict, see *Tyson v. Prior*, 1 Gall. 133; *Rowe v. Brig* —, 1 Mason, 272; *The Boston*, 1 Sumn. 328; *Flinn v. The Leander*, Bee's Adm. R. 260; *L'Esperance*, 1 Dodson, 46; *Abbott on Shipping*, Part 3, ch. 10, Perkins's ed.; 2 Br. Civ. and Adm. Law, 51; *The Barefoot*, 1 Law & Eq. R. 661; *Clark v. Chamberlain*, 2 Mees. & W. 78; *The Beaver*, 3 C. Rob. 292.]

of recovery; I say without hope of recovery, because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment.

Sir Leoline Jenkins defines derelicts to be, "Boats or other vessels forsaken or found on the seas without any person in them. Of these the Admiralty has but the custody, and the owner may recover them within a year and a day."<sup>1</sup>

This case, therefore, is to be considered as derelict; and in that form the proceedings were originally commenced against both the ship and cargo. The ship has been claimed and restored; the cargo has not been claimed; but there was reason to expect an owner would appear, as there were papers on board describing it to be the property of a neutral owner. Some suspicions occurred, however, that it was in fact the property of an enemy; and under these circumstances it became expedient to proceed against it as prize, for the purpose of meeting the pretensions of the ostensible neutral owner, and of bringing the examination of his claim, where alone it could be properly discussed, into the Prize Court. These measures were highly necessary, and therefore no objection can justly be made against the mode of proceeding which has been pursued in this case on behalf of the crown.

It has been contended, that this, being a case of derelict, is therefore not a case of salvage; and a distinction has been made, [\* 42 ] as if salvage was one thing and derelict \* another; but I must observe, that the parties themselves, in the very outset of the case, alleged themselves to be salvors, and prayed to be rewarded in that character. This distinction, therefore, is not very consistent with their own plea.

It is farther argued on the same principle, that it is the property of the goods, and not a mere title to reward, that has been acquired by these finders by right of occupancy; and it has been attempted to support this demand by various citations from the civil law. It is certainly very true that property may be so acquired; but the question is, to whom is it acquired? By the law of nature, to the individual finder or occupant. But in a state of civil society, although property may be acquired by occupancy, it is not necessarily acquired to the occupant himself; for the positive regulations of the state may have made alterations on the subject; and may, for reasons of public peace and policy, have appropriated it to other persons; as, for instance, to the state itself, or to its grantees.

It will depend, therefore, on the law of each country to determine

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<sup>1</sup> Life of Sir Leoline Jenkins, vol. 1, p. 89.

whether property so acquired by occupancy shall accrue to the individual finder, or to the sovereign and his representatives; and I consider it to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the sovereign, if no owner shall appear.<sup>1</sup> Selden lays it down as a right annexed to sovereignty,<sup>2</sup> and acknowledged amongst all nations, ancient and modern. Loccenius mentions it as an incontestible right of sovereignty in the north of Europe.<sup>3</sup> Valin ascribes the same right to the crown of France;<sup>4</sup> and speaking of the rule in \*France, that a third [\*43] shall be given to salvors, in cases of shipwreck, expressly applies the same rule to derelicts, as standing on the same footing. In England, this right is as firmly established as any one prerogative of the crown; I have already adverted to the authority of Selden. In some manuscript notes, which I have of a very careful and experienced practiser in this profession, Sir E. Simpson, he says, "By marine law, the Lord High Admiral has the custody of derelicts found at sea; if no owner appears, they become perquisites of admiralty; the finder can have no property in them; only a reward for his trouble, in preserving them; if no owner appears, or if the claimant cannot prove his property, the salvors have not acquired any right in the thing found, but they must be satisfied for their expense and trouble from a sale of the ship and cargo." And indeed in the very case for which I am indebted to the industry of Dr. Swabey, the title of the crown is fully recognized.

But another question is started: whether, although the crown is allowed to have the exclusive right of property, in cases where no owner appears, there is not an universal rule that gives to the finder, in all cases alike, without regard to the degrees of merit or service, one moiety of the thing preserved? We should certainly not be very desirous to find such a rule; nor could we wish to reduce to one dead level the various degrees of merit that must perpetually occur, according to the particular circumstances of each separate case. If there was such a rule, however, it would be my duty to obey it; but I can find no such rule in the general maritime law. I have looked into the books on this subject; in \*The Consolato [\*44]

<sup>1</sup> [As to the property in derelict see Bee's Adm. R. 82; The King's Property Derelict, 1 Hagg. Ad. R. 383; 2 Bl. Comm. 9; The Thetis, 3 Hagg. Ad. R. 235, and S. C. 2 Knapp. 408; 2 Brown Civ. and Adm. Law, 52; The Belle Creole, 1 Pet. Adm. R. 31; The Cato, 1 Pet. Adm. R. 48; The Amethyst, 1 Davies, 20; The King v. 49 casks of brandy, 3 Hagg. Ad. R. 270.]

<sup>2</sup> De Dom. Maris, lib. 1, c. 24.

<sup>3</sup> Lib. 1, c. 7, 10.

<sup>4</sup> Lib. 4, tit. 9, art. 26.

del Mare, and in other books, I find no such rule; I find no such rule established by the practice of other European nations.<sup>1</sup>

By the citations which have been made from the Black Book of the Admiralty, it does indeed appear that anciently the division which usually took place between the Lord High Admiral and the finder of derelict, was by moieties; and the papers to which my attention has been called by Dr. Swabey, do show something of a continuance of such a rule down to the time of Charles II. It appears from those papers, that the whole was condemned as of right to the king, and half was afterwards given to the finder. There still remains some ambiguity, however, in what manner this share was given; whether in conformity to a general rule, then conceived to be binding, may be doubted, though I am inclined to think it was.

In later cases, however, I find no observance of any such rule. In 1777, there was a case of considerable merit, in which Sir G. Hay gave only a third. In 1779, there was another case of a bag of money found in the sea, of which three eighths were given. A case has been cited by the Advocate of the Admiralty, in which Sir W. Wynne, then King's Advocate, and the then Advocate of the Admiralty,<sup>2</sup> recommended it to the crown to allow a moiety; but I do not understand that opinion to have been given in conformity to any positive or prevailing rule. "It appears to us," says that opinion, "that the salvors are entitled to a moiety for the merit which they

[ \* 45 ] have had in this transaction." \* By these words they evidently appear to have taken their measure not from any precise rule, but from the particular circumstances of the case, and imply therefore a denial of the existence of any express rule

<sup>1</sup> [ As to the amount of salvage to be given in cases of derelict see *Rowe v. Brig—*, 1 Mason, 372; *The Henry Ewbank*, 1 Sumn. 400; *The Fortuna*, 4 C. Rob. 193; *The Blendenhall*, 1 Dod. 414; *The Lord Nelson*, Edw. Adm. R. 79; *The Maria*, Ib. 175; *L'Esperance*, 1 Dod. 49; *The Mary Ford*, 3 Dall. 188; *The Blaireau*, 2 Cranch, 240; *The Reliance*, 2 Hagg. Ad. R. 90 n; *The Britannia*, 3 Hagg. Ad. R. 153; *The Effat*, 3 Hagg. Ad. R. 165; *The Ewell Grove*, 3 Hagg. Ad. R. 209; *The Thetis*, 2 Knapp, 410, and S. C. 3 Hagg. Ad. R. 14; *The Jonge Bastiaan*, 5 C. Rob. 322; *The Jubilee*, 3 Hagg. Ad. R. 43 n; *Sprague v. One hundred and forty barrels of flour*, 1 Story R. 195; *The Elliotta*, 2 Dod. 75; *The Frances Mary*, 2 Hagg. Ad. R. 89; *The Eugene*, 3 Hagg. Ad. R. 156; *The Twee Gelroeders*, 3 Hagg. Ad. R. 430 n; *The Martha*, 3 Hagg. Ad. R. 434; *The Watt*, 2 W. Rob. 70; *The Nicolina*, 2 W. Rob. 175; *The Charlotta*, 2 Hagg. Ad. R. 361; *The Queen Mab*, 3 Hagg. Ad. R. 242; *The Carolina*, 2 W. Rob. 124; *Queen v. The Windsor Castle*, 2 Notes of Cases, 53 Supplement; *The Sarah Bell*, 4 Ib. 145; *The Columbia*, 3 Hagg. Ad. R. 428; *The Rising Sun*, Ware, 378; *The Helene*, 3 Hagg. Ad. R. 430 n; *The Salacia*, 2 Hagg. Ad. R. 262; *The Waterloo*, 2 Dod. 433; *Peisch v. Ware*, 4 Cranch, 347; *The Cato*, 1 Pet. Ad. R. 48; *The Amethyst*, 1 Davies, 30; *The Cora*, 2 Pet. Ad. R. 361.]

<sup>2</sup> Sir W. Scott.

at that time. The notes of Sir E. Simpson, which I have before cited, prove that he knew of no such rule; for after saying, "In such a case it becomes a perquisite of Admiralty," had there been such a rule, he would naturally have added; not, as the words now stand, "The salvors must be satisfied for their expense and trouble;" but "the salvors shall take a moiety;" he therefore had no knowledge of such a rule.

On a view of the whole argument, and looking at the latest practice of these courts, I am of opinion that there is no such rule; it may have existed, and become obsolete. Many alterations in practice we know have taken place since the compilation of the Black Book of the Admiralty; and perhaps there may have been a change on this point. If such a rule ever existed, it is become obsolete; and as there is nothing reasonable in the principle, that should induce us to wish for its revival, I shall pronounce the salvors not to be *de jure* entitled to a moiety; but applying the discretion of the court to the circumstances of this case, I shall decree to them two fifths of the cargo saved.

The next consideration is, who are the salvors? and in what proportion is the reward to be distributed amongst them? There are three different parties; the crew of a small vessel who first took possession, ten in number; the crew of another small vessel coming to the assistance of the former, three in number; [ \*46 ] and, thirdly, a gentleman, a magistrate, who interfered in a later stage, and wishes to be considered as a salvor. With respect to the two former parties there can be no doubt, they are both entitled; but it is contended on behalf of the first set, that they are the only salvors, and that the second ship's crew ought to be paid only for assistance and labor, but not as salvors. On the other side, the second crew demand to be placed on an equal footing with the first. In my opinion the justice of the case lies between the two pretensions; I think the second crew gave assistance very material in its effects, but of a subordinate nature; I shall therefore consider them as salvors of a second class, acting under the direction of the first, and decree them to take but half shares.

I come now to examine the pretensions of the magistrate; and I can try them only by his own affidavit, as there is no other evidence which takes any notice of them. I do not remember any case in which a magistrate acting in discharge of his public duty has demanded to be considered as a salvor; and, therefore, I do not much wonder at the diffidence which has restrained this gentleman from giving in his claim till a very late hour; this, however, is certain, that if a magistrate acting in his public duty, on such an occasion, should

go beyond the limits of his official duty, in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor; it will be therefore necessary to inquire what has been the extent of this gentleman's services; if they amount only to [ \*47 ] the ordinary discharge of his duty, I shall be \*disposed to leave him to the general reward of all good magistrates,—the fair estimation of his countrymen, and the consciousness of his own right conduct.

Now I do not discover any peculiar vigilance or activity in his conduct on this occasion. The first finders sent to him to inform him of the situation of the vessel, and offered to put it into his possession; so far he is only passive. But he goes on to state as an eminent service, "that he sent fifteen men, under the obligation of an oath, which he administered to them, to assist; and that by their exertions the ship was righted in the harbor; and two hundred persons, who had come down as it is said, "according to the custom<sup>1</sup> of that coast, for plunder, were driven off."

<sup>1</sup> The barbarous practices of individuals on a remote coast require no comment; but it is a matter of surprise to see that owners under this distress should ever have met with obstruction in the recovery of their property, from the claims and pretensions of States.

The laws of Rhodes are supposed to have made wreck a fiscal perquisite, to the exclusion of the owner. Seld. Dom. M. lib. 1, c. 25. And, these laws being adopted as the maritime laws of Rome, the same harsh principle prevailed amongst the Romans, till Antoninus (as it is generally held) corrected it. Code 11, tit. 5. In the later periods of the Roman empire it was again revived; and on the dissolution of the empire, wreck seems to have become a common perquisite of the State, in the maritime nations of Europe. Valin. lib. iv. tit. 9. Vinnius on the Inst. lib. ii. tit. 1, art. 14, note 5.

In England, a distinction favorable to the sufferers, was introduced in the time of Henry I. reserving to them the right of property, if any person escaped alive out of the ship. By the 3d of Edw. I. c. 4, (see also 20 Henry II. R. Fœd. v. 1, p. 36,) it was declared to belong to the crown only, where no man, cat, or dog, escaped; and in cases where it was not claimed within a year and a day. "These animals have been long considered as put only for examples; as it is now held, that not only if any living creature escape, but if proof can be made of any of the goods or lading which come on shore, they shall not be forfeited as wreck." Bl. Comm. b. 1, c. 8. If so, the technical distinction seems to be done away; and there can be no difference between things wrecked and goods dispossessed by stranding or other accidents of the sea. With respect to these, the 12 Ann. st. 2, c. 18, made perpetual by stat. 4, Geo. I. c. 12, removes the old limitation of time for claiming, by directing the goods to be sold at the expiration of a year and a day, and the proceeds to be deposited in the Exchequer for any owner that shall appear and make sufficient proof. The 26th of Geo. II. c. 19, makes it a capital felony to steal from ships in distress, whether wreck or no wreck; these statutes seem to afford as much protection to property in this calamitous situation as law can give.

In France it was not without a longer struggle that this simple and most obvious duty of humanity was established; so late as the reign of Henry II. a memorable in-

\* Now I must say, that if a magistrate was aware that such [ \* 48 ] a barbarous custom prevailed in his neighborhood, it might have occurred to him that his presence was requisite on such an occasion. The presence—the eye—the voice of a magistrate avail much. It does not, however, appear, either that he \* at- [ \* 49 ] tended, or that he was prevented by unavoidable accidents from attending. As he did not attend, I think there was reason enough to fear that those fifteen men might conform to the barbarous *lex loci*, enforced as it was by a multitude of two hundred persons; and that they might think much more of the plunder they could take, than of the oath which they had taken. However, it does turn out, by great good luck, that these fifteen men put to flight the two hundred. I own, I see more good fortune in the event, than prudence in the measure that was pursued; at any rate the fifteen men must be paid very liberally for their assistance.

A second plea of merit advanced on the part of this gentleman is, that he sent notice to the Swedish consul, and to Lloyd's coffee-house; so far he acted with great propriety; perhaps more might have been done. It is fit a magistrate should know that, when a ship comes into port in the condition of this vessel, there are interests of the crown which, on behalf the public, it is his duty to protect. Notice should have been sent also to the officers of the crown.

Upon the whole, commending this magistrate for what he did, but thinking that he might perhaps have done more, I am not authorized to pronounce that he is a salvor in this case, nor entitled to any share of the salvage, which I decree to be paid to the other parties.<sup>1</sup>

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stance occurs. The ambassador of the Emperor of Germany claimed two vessels, wrecked on the coast of France, for the Emperor, and received an answer from the Constable Montmorenci, "That they were the perquisite of the crown of France." And again, "Ita jus invaluit," says Bodin, "ut ne Andreas quidem Doria questus sit, de navibus in litore Celtico ejectis, et a præfecto Classis Gallie direptis." Valin, lib. iv. tit. 9. It does not appear how soon the right of the owner was again admitted in France (for it had been before recognized in former ordinances); but Valin thinks the claims of owners have met with no opposition from the State since the ordinance of 1584.

It is scarcely necessary to add, that every humane provision is made for the alleviation of accidents of this nature, in the excellent marine ordinances of Louis the XIVth.

<sup>1</sup> The value of the ship, cargo, and freight, amounted to about £12,000.

[ \* 50 ]

\* THE SANTA CRUZ, Picoa, master.

December 7, 1798.

The law of England, on recapture of property of allies, is the law of reciprocity; it adopts the rule of the country to which the claimant belongs.

THIS was a case of a Portuguese vessel taken by the French, 1st of August, 1796, and retaken by English cruisers, on the 28th, after being a month in the possession of the enemy. It was the leading case of several of the same nature, as to the general law of recapture between England and Portugal.

For the captors, the *King's Advocate*, and *Laurence*. This is a case of a Portuguese vessel taken by the French on the 1st of August, and retaken by English cruisers on the 28th. The French had sent away or destroyed the papers, so that there did not appear sufficient proof of the property; but all inquiry upon that point is superseded by a consideration of law. In the opening, on a former day, the whole case was distinctly placed on the authority of the decision in the *San Iago*;<sup>1</sup> and the principle of reciprocity which determined that case was so readily admitted by the court, that the parties were immediately referred to produce evidence respecting the law and practice of Portugal on the subject of recapture; the principle of law, therefore, must be held to be established; the evidence of the fact is now before the court. On the part of the captors, it consists not of ordinances and expositions of ordinances, but of acts which no argument can affect; they appear in the proceedings of the Court of Portugal, on two British ships, *The Anne*, and *The Endeavor*, which coming out of the hands of the French into the possession of Portuguese subjects, were claimed for the original owners, but were condemned as lawful prize.

[ \* 51 ] \* On these grounds, on the authority of the law of Portugal, it is submitted, this vessel must be condemned to the British captor.

For the claimant, *Arnold* and *Sewel*. This is a case which respects the property of an ally, recaptured from the common enemy; and the question is, why restitution should not pass to the original proprietor? On all general reasoning, and the principles of common

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<sup>1</sup> Lords, January 28, 1795.



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equity, it is a demand that seems to admit of no opposition; but it is still more strongly supported by the ancient law of Europe, and the daily practice of these courts. In respect to the time when property is to be deemed converted by capture, the ancient law of Europe, (Consol. del M. c. 287; Bynk. Q. J. P. lib. i. c. 4, 5,) held, that a bringing *infra præsidia* was absolutely necessary to fortify the possession of the captor, and divest the original proprietor of his claim. Some nations have, indeed, by later regulations, substituted a possession of twenty-four hours as a state of sufficient security, but it is an alteration which does not appear to be founded on any rational principle; and what is of more importance to the present argument, it has never been admitted into the practice of these Courts;<sup>1</sup> for this

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<sup>1</sup> It is asserted by Grotius, b. 3, c. 6, s. 4, note 7, on the authority of Albericus Gentilis, b. 1, c. 3, that England was among the nations that had adopted the rule of twenty-four hours, in prize matters; but the passage in A. Gentilis is no authority to this effect as it is taken from the chapter treating expressly *de judicio militum*, and the practice of different nations in respect to military booty, which, Gentilis himself contends, stands on different grounds from maritime prize; on which latter point he maintains that it was necessary, *et ut capta sit, et perducta infra præsidia*. In respect to military booty, the law of England appears to have held anciently, "that if an enemy dispossessed an Englishman, and another Englishman took the booty from the enemy, the former owner shall lose his property so gained in battle, unless he comes and claims in the same day *ante occasum solis*, and neither the king nor the admiral, nor the former owner shall have any claim to it." 7 Ed. 4, 14. In Crompton's Jurisdiction of Courts this is cited under the chapter on the High Steward, Constable or Marshal's Court, and although the word admiral is used, both the original *dictum* in the Year-book and the passage to which it is applied, relate to land capture. It is not improbable that the principle might be common to maritime as well as military capture; but the authority cited by Grotius does not ascertain it. In the early periods of English history, 31 Ed. 3, and again 2 Hen. 4, two instances occur in which it is maintained against Portugal and Prussia, that capture from the enemy was sufficient to vest the property, even of goods, before taken from a neutral. Rym. Fœd. v. 6-14, vol. 8, p. 203; but there is no mention of the rule of twenty-four hours; it is not impossible however that Grotius might be in some degree justified in his fact, on more recent authority, and more immediately pointing to the doctrine of twenty-fours; for soon after the publication of his work, and before the additional notes were added by him in his later editions, the question is asserted to have been mooted in England, and settled in this manner. In Thurlow's State Papers, v. 4, p. 589, there is a specific assertion of the Dutch Resident in 1656, "that after many suits, and afterwards appeals had in the council of the king, anno 1632, it was understood that *jure post liminii* no ships ought to be restored which had been twenty-four hours in the power of the taker." But *quære* — so soon afterwards as 1672, we have the testimony of the then Judge of the Admiralty, Sir L. Jenkins, that he could find no traces of it in the earliest part of that century. His words will show, that it was not practised during the Usurpation, nor acknowledged afterwards by him.

On a case referred to him by the king, he reports: "In England we have not the letter of any law for our direction; only I could never find that this Court of Admi-

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country has ever resisted the innovation, and adhered strictly to the old rule as a fundamental principle of its prize law.

[ \* 52 a ] \* But it may be said, this practice stands upon the regulations of our prize acts; the acts, however, but carry into effect the principle of the old and general law; and were they, even in this respect, matters of a novel institution, whilst they prescribe a law to British subjects, they would create an equitable right for our allies to have the benefit extended to them; and in fact the right to restitution, on whatever grounds it is [ \* 53 ] \* founded, has always been acknowledged in the practice of this court.

In the present war, there have been many cases relating to several of our allies, in which it has been so adjudged; there are some relating particularly to Portugal, and others may be produced from the earliest parts of the present century. In 1703, The Saint Catherine; in 1704, the Blackiston, both Portuguese vessels, were restored, on recapture, after having been many days in the possession of the enemy, but never carried into port. In the present war, The Memphis, The Minerva, The Joachin d'Alva, all Portuguese vessels, have been restored without opposition, and sufficiently establish the law of of this country to be towards allies, as well as towards British subjects, a law of restitution on salvage.

But between Portugal and this country, the rule has also been re-

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rality, either before the late troubles, or since your Majesty's happy restoration, has in these cases adjudged the ships of one subject good prize to another; and the late usurpers made a law, in 1649, that all ships rescued, whether by their own men of war, or by privateers, should be restored on paying one eighth salvage, without any regard to the time such ship had been in possession of the enemy, or to any other circumstances, unless the ship taken were made a man of war by the enemy; and in that case a moiety went for salvage, but the ship was still to be restored. Whether the usurpers intended this as a novelty or an affirmation of the ancient custom of England, I will not take upon me to determine, only I will say, condemnation upon the enemy's possession for twenty-four hours is a modern usage." *Life of Sir L. Jenkins*, vol. ii. page 770.

In Holland the rule had prevailed and was abrogated by Ord. 11, March, 1632. *Groenewegen*, De. Leg. Abr. Dig. l. 49, tit. 15.

In France it is spoken of in an ordonnance of 1557, as an ancient rule; and an edict of K. Henry issued at that time, to restrict it still farther to twelve hours, "for the purpose of stimulating cruisers to recover captured property before it was carried into the enemy's ports;" as, it was said, might easily be done in eight or nine hours, owing to the proximity of the English coast. The Parliament refused to sanction the alteration, and the old rule was retained. *Ter. p. 565.*

This ordonnance shows the true spirit of the rule, and marks it as a private regulation of expediency, rather than as a rule, containing in it any rational principle of public law.

cognized and confirmed by treaty. By the treaty of 1654, art. 19, the two countries bind themselves to "restore prize goods brought into the ports of either by an enemy;" and therefore they must, *a fortiori*, be bound to restore in recaptures arising from the operations of a joint and common war; it is said, however, that these equitable principles, and the established practice of this court, must now give place to a minute reciprocity—to an inquiry into the law of Portugal, and into the fate of each individual case which has occurred before the tribunals of Portugal on the subject of recapture; and on this point, the whole argument rests on the case of the *San lago*. But without impeaching the justice of that decision, it may be allowable to deprecate the application of it as a general rule of law; it was not so pronounced, nor in that extent; it respected a different country; it is a single case, and remains at present unsupported by any series of decisions to establish the principle of it, to be an "universal principle of prize law. The name and [ \* 54 ] character of England seem to require, that such a country should administer justice by a firm adherence to principles which it has itself approved, rather than by occasional references to foreign codes. The inconvenience of resorting to the law of foreign countries amounts in some points of view almost to an absurdity; we shall have rather a medley of particular cases than a rational and consistent train of legal decisions. Shall England take its law from Tunis or Algiers? or shall it be left, as such a principle may leave it, to the weakest and worst governed state to give law to the rest of Europe?

But even, in respect to the fact, which has been made the subject of inquiry in this case, the claimant has nothing to apprehend; it is certified on the best authority, on the authority of eminent lawyers, and of the principal persons in the government of Portugal, that there was no law on the subject of recapture in that country before the ordinance of December, 1796. The judges of the Courts of Admiralty make this declaration; and further certify, "that there had been no instance in which recaptured British property had been condemned in Portugal;" and "that, considering the practice of England, and the treaty between the two countries, they should have restored British property in a similar situation." Such then was the state of the law of Portugal when the recapture was made. The ordinance of December, 1796, which declares ships recaptured after a possession of the enemy for twenty-four hours to be lawful prize, is, in respect to this case, an *ex post facto* law. If that ordinance is applied to the present "case, the later ordinance of May, 1797, which [ \* 55 ] directs restitution, must likewise be applied; but it is still

further observable on the ordinance of 1796, that it relates only to the ships and subjects of Portugal.

A particular explanation has also been given, of the circumstances of two cases which have been cited on the part of the captors, as a proof of the law of Portugal; and it appears, that in these the claimants failed of redress, the one by applying to an incompetent jurisdiction, and the other by relinquishing his claim. In the certificate of the judges, it is stated, "that The Endeavour was carried before an incompetent jurisdiction; that the decision was founded on wrong principles; and that there has been since an order given for rehearing the cause before the proper Court."

In *The Anne*, the certificate gives this statement of the proceedings: "The British master had obtained an embargo on the vessel, which, on application by the Portuguese master, was taken off by the Secretary of State; the British claimant then deserted his claim, whilst he was still entitled to bring it before the Court." The Secretary of State also certifies, "that the order given by him to remove the embargo was not intended to obstruct the claim, or prejudice the final decision of the cause." There is nothing then in either of these cases that can be admitted as proof of the law of Portugal as it is administered by the proper courts: the judges of those courts declare, "there was no law by which they should have condemned;" but

"that they should have restored British property under similar circumstances;" \* and this statement of the law has received additional confirmation from the subsequent act of the State; for since the circumstances of the present war have called for more explicit declaration of the laws of prize, all doubt has been removed from this question by an ordinance, which expressly directs restitution of the property of allies on the payment of one fifth salvage. On these considerations therefore, of the equity of the case, of the laws and practice of England, and of the rules observed in Portugal, the claimant stands entitled to restitution on the accustomed salvage.

The *King's Advocate* and *Laurence*, in reply. Under the authority of the *San Iago* it is now unnecessary to argue the rule of reciprocity. It will be sufficient to observe, that it was not laid down in that case as novel in principle, or limited in application; it stands on a principle of natural equity, which must ever prevail between parties acting freely in support of their own rights, and independent of any common control. The judges themselves recognize the principle when they say, "that looking to treaties, and the practice of England, they should have restored." In respect to the treaty of 1654, it is clear,

that it has not been considered by this Court as applicable to decide the present question; for if it were so, reference would not have been made for information on the rule and practice of Portugal; it is a treaty which refers evidently to a state of neutrality in one party, and therefore does not apply to the cases of a common war.

If it is to be applied by inference or construction, the true meaning of an ancient treaty will best be \*sought in the [ \* 57 ] practice which has been observed under it; it is attempted to confound principle with the evidence of fact, but the principle of reciprocity being established, the fact only is known to be examined; the opinions and explanations of lawyers can avail nothing against the clear fact, that Portugal has condemned British property under similar circumstances; it is besides observable, that these opinions and certificates do not assert that there was no law, but that there was no positive law. In this doubtful state of their law, the practice of the courts of Portugal will be the best guide. The public courts of Lisbon, acting as appears under a communication with the cabinet of Lisbon, have in two cases, adjudged British property coming out of the hands of the enemy to the recaptor; on these grounds it is submitted, this vessel must be condemned.

The Court, after the argument in the Santa Cruz, desired to hear the distinctions that were to be taken, in favor of, or against, the remaining cases.

On the Santa Reta, taken on the 12th of March, 1797, and retaken on the 20th, it was argued for the captors, that subsequent to the ordinance 1796, the law was still stronger and more clear on this point than it was in the preceding case; for that ordinance expressly declared all recaptures after a possession by the enemy for twenty-four hours to be lawful prize.

For the claimant it was contended, that the ordinance of December, 1796, related solely to Portuguese cases, and left the general law towards allies on the ancient footing; that the only operation which this \*ordinance could have was favorable to the [ \* 58 ] claimants, as it served to prove that the general law before that time had not led to condemnation.

In the remaining cases, retaken after the ordinance of May, 1797, it was contended on the part of the captors, that the government of Portugal having established a general law, and acted under it, was not at liberty to alter this rule during a war; that such changes were introduced from the fluctuations of their own views of interest, and

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not from any fixed principles of justice; and therefore that they were such alterations as an ally was not bound to admit.

JUDGMENT.

SIR W. SCOTT. These are cases of Portuguese ships or cargoes, eight in number, which have been recaptured at different times by British cruisers.

As far as the dates of the recaptures are material, they are to be distinguished under three periods: The first vessel was recaptured before the month of December, 1796, when an ordinance on the subject of recapture passed in Portugal; the second was retaken between the months of December, 1796, and May, 1797, when another ordinance took place, more expressly respecting the property of allies recaptured from the enemy; the rest may be stated generally, without farther distinction, to have been taken subsequently to the 9th of May, 1797. It is necessary to distinguish these dates, as it is said the difference of date may affect the application of the general principle, whatever that may be, to the particular cases.

They are cases of very considerable value, of much importance, and of no mean difficulty in many respects; under a choice [ \* 59 ] of cases, they are not such as \* I should particularly wish to determine; but they devolve on me in the regular course of my duty; and I am bound to decide them according to my own best informed apprehensions of law and justice, of the general law of nations, as it has been understood and administered in the British Courts of Admiralty.

In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor; and it certainly is a question of much curiosity, to inquire what is the true rule on this subject; when I say, the true rule, I mean only the rule to which civilized nations, attending to just principles, ought to adhere;<sup>1</sup> for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general law.

It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours possession; or it might be the rule of bringing *infra præsidia*; or it might be a rule requiring an actual sentence of condemnation. Either of these rules might be sufficient for general practical convenience, although in theory, perhaps, one might appear more just

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<sup>1</sup> [The Flad Oyen, 1 C. Rob. 135, 139.]

than another; but the fact is, there is no such rule of practice; nations concur in principle indeed, so far as require firm and secure possession; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to \*regulate [ \* 60 ] the general practice. But were the public opinion of European States more distinctly agreed, on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

That obligation could arise only from a reciprocity<sup>1</sup> of practice in other nations; for from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary, to that one nation to pursue a different conduct; for instance, were there a rule prevailing among other nations, that the immediate possession, and the very act of capture, should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle; and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from which \*gross injustice must ensue in prac- [ \* 61 ] tice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety therefore is on one side, and real practical justice on the other; the rule of substantial justice must be held to be the true rule of the law of nations between independent states.

If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the prac-

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<sup>1</sup> This principle of reciprocity is acknowledged as a necessary principle of public law, by Valin:

"—Me seroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leur effets repris sur des pirates par des Francois, ne doivent s'entendre que de ceux qui suivent la même jurisprudence que nous; autrement, il n'y auroit pas de réciprocité: ce qui blesseroit l'égalité de justice, que les Etats se doivent les uns aux autres." Valin, l. 3, tit. 9, art. 10.

See also the same principle adverted to in a case arising on the practice of France. Life of Sir L. Jenkins, vol. 2, p. 744.

tice of nations is not so ; but I think such a rule would be both liberal and just ; to the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country ; to the recaptor, it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing amongst his own countrymen, would restore, it brings an obvious advantage ; and even in the case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

It may be said, what if this reliance should be disappointed ? Redress must then be sought from retaliation ; which, in the disputes of independent states, is not to be considered as vindictive re-  
[ \* 62 ] taliation, but as the just and equal measure of civil \*retribution ; this will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic ; something must on all occasions be hazarded on just and liberal presumptions.

Or it may be asked, what if there is no rule in the country of the recaptured ? I answer, first, this is scarcely to be supposed. There may be no ordinance, no prize acts immediately applying to recapture ; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries. It is the common practice of European States, in every war, to issue proclamations and edicts on the subject of prize ; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule, and rest on the presumption, that that rule will be adopted and administered in the future practice of its allies.

Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular. It may be so ; but it will be a discordance proceeding from the most exact uniformity of principle ; it will be *idem per diversa*. It is asked also, will you adopt the rules of Tunis and Algiers ? If you take the people of Tunis and Algiers for your allies, undoubtedly you must ; you must act towards them on the same rules of relative  
[ \* 63 ] \*justice on which you conduct yourselves towards other nations. And upon the whole of these objections, it is to be observed, that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety. A regulation may be extremely unfit to be made, which, yet, shall be extremely fit,



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and shall indeed be the only fit rule to be observed towards other parties who have originally established it for themselves.

So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this: that the maritime law of England, having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject. It was clearly so recognized in the case of the *San Iago*; a case which was not, as it has been insinuated, decided on special circumstances,<sup>1</sup> nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir E. Simson), which records the practice and the rule as it was understood to prevail in his time. "The rule is, that England restores, on salvage, to its allies; but \*if [ \* 64 ] instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule."

I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law. At the breaking out of a war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores.

It is a principle sanctioned by that great foundation of the law of England, *Magna Charta* itself;<sup>2</sup> which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

In recaptures, it is observable, the liberality of this country outsteps its caution; it restores on salvage without inquiry, till it appears that the ally pursues a different rule. It may be said, there may

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<sup>1</sup> Lords, January 28, 1795.

<sup>2</sup> Art. 41. Omnes mercatores, &c. Et si sint de terra contra nos gwerrina, et si tales inveniantur in terra nostra in principio gwerre, attachiantur sine dampno corporum et rerum, donec sciatur a nobis, vel Capitali Justiciario nostro, quomodo mercatores terre nostre tractentur, qui tunc inveniantur in terra contra nos gwerrina, et si nostri salvi sint, alii salvi sint in terra nostra.

be inequality and hazard in this prompt liberality; and we may restore while the ally condemns; and so the fact has been; for it is not to be denied, that before the case of the San Iago had introduced a more accurate knowledge of the Spanish law, restitutions of Spanish property on recapture had passed as of course. The more accurate rule, however, is that which I have laid down.

[\*65] \* In the present state of hostility (if so it may be called) between America and France, the practice of this court restores American property on its own rule, without inquiring into the practice of America. It acts on the same principle towards Danes and Swedes, and Hamburgers, in the ambiguous state in which the rapine of France has placed the subjects of these governments;—towards Portugal, then, undoubtedly a less liberal treatment would not be observed; connected by long alliance, by ancient treaties, by mutual interests and common dangers, if Portugal forfeits the benefit of a rule which has been before observed as a general rule, it can be only on this ground: that the courts of that country have applied a different rule to the property of British subjects. The question, then, for the court to determine, will be simply this: Has Portugal applied a different rule to British property taken by the enemy, and coming out of their hands into the possession of Portuguese subjects?

But before I enter on this inquiry, it may be proper to consider the treaties that subsist between the two countries; because if they have prescribed a rule, it will render all farther discussion unnecessary. A treaty,<sup>1</sup> to which much reference has been made, thus strongly and emphatically expresses the terms of union between the two countries: “Neither of the confederates shall suffer the ships and goods of the other, or of the people of either, which shall at any time be taken by the enemies of the one and carried into the ports of the other, to be conveyed away from the owners or proprietors; but the same shall be restored to them or their attorneys, provided they claim

[\*66] \* them before they are sold or cleared, and prove their rights within three months, and pay the necessary expenses for preservation and custody.” Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations; for no neutral country can interpose to wrest from a belligerent prizes lawfully taken;<sup>2</sup> but I think it goes a great way to prove the spirit of the

<sup>1</sup> Treaty 1654, art. 19.

<sup>2</sup> The notion of receiving restitution from a neutral power seems, soon after this treaty, to have been found to be inconsistent with the rights of belligerents, as acknow-

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contracting parties; and I agree with Doctor Arnold, that it goes the whole length of the present claim; for such a treaty of alliance is not a thing *stricti juris*, but ought to be interpreted with liberal explanations. And although it may seem to point more [ \*67 ] immediately to a state of things in which one of the contracting parties is neutral; yet it would be strange to say, that it binds the party to seize, for the purpose of restitution, where there is no right of seizure; but that it shall not oblige him to restore, when he has a complete right of seizure, and has already acted on that right. The treaty does, therefore, in its spirit and meaning, embrace the restitution of property.

But then, again, I am to inquire, whether Portugal has put the same interpretation upon it; for if that government has used a different interpretation, that forms the rule which I must follow. The case therefore upon the treaty comes exactly to the same question, as the case upon the law: what has Portugal done? what acts are there from which we may collect the construction which Portugal puts upon the law and upon this treaty?

I come then to this important question on the fact. On the original papers and depositions nothing appeared; restitution therefore would have passed on salvage, according to what I have described to be the law of England; but the captors offered papers to show that a different rule had prevailed in Portugal with respect to British property; in this state of doubt, the court ordered further information, and proof to be produced, respecting the law of Portugal on recapture, and by both parties. Now the first question is, Who is more

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ledged by the law of nations. Between the year 1666 and 1670, there is this report, among the letters of Sir Leoline Jenkins. Vol. ii. p. 132.

"The question in law is, whether this Biscanier, being brought into your majesty's port, ought not, on account of your majesty being in amity with the Catholic king, to be rescued from under the power and force of his enemy, and *jure post liminii* to be restored to his own. The law of nations, as it is at this day observed, seems not to pass any obligation on your majesty to impart your royal protection unto one friend to the prejudice of another. This captor being *jure belli*, which is a very good title, in full and quiet possession of his prize — and so he was for a fortnight together at Portsmouth, before he was discovered — will take it for an act of partiality to have it now wrested out of his hands and given to his enemies; whereas no man's condition is to be made worse than another's, in a place that is reputed of common security upon the public faith. Besides, the French ordinances do expressly provide, that leave be given to all strangers to depart those ports with such prizes as they happen to bring in. It is the practice of Spain, at this day, and of all other ports that I can learn any thing of, in cases of neutrality." A similar article to this referred to in the treaties with Portugal, is to be found in a variety of ancient treaties from the beginning of the 15th century.

particularly expected to produce this proof? And it has been much pressed by the counsel for the claimant, that the *onus probandi* [ \*68 ] lies on the recaptors. It lies with them, it has been said, to show that Portugal uses a different rule; or at least to raise a strong presumption of that fact. But I am of opinion, that the recaptors have sufficiently discharged their duty to the court, by the papers which have been produced.

The *onus probandi* then shifts; and it becomes a duty on the claimants to exonerate themselves from the presumption raised against them, and to show that their law is not such as the *prima facie* evidence of the captors represents it to be.

They have besides great advantages in this research; the law and the country are their own; access is easy to them, to the best information. They have reason to expect all that the diligence, the acuteness, and the zeal of their countrymen can produce on their side; but the captors must hunt out a foreign law, through a foreign language, and with the assistance of professors not much disposed to promote their inquiries. The means are evidently unequal between the parties; and the means being unequal, the obligation is by no means equal. All defect of proof, therefore, must press principally on the claimants, from whom the court is entitled to expect proof of the fullest and most satisfactory nature.

It has been asked, what proof must we produce? The question admits of an obvious answer. In the first place the court will expect the text law, the existing ordinances. Now I think it does appear, that there are ordinances on the subject which have not been produced. The ordinance of 1796 refers to an ordinance of the year 1704, as the basis on which it was framed; I have therefore a right to conclude that

this ordinance has formed the substance of the Portuguese [ \*69 ] prize law for a century; but yet no notice has been taken of it. In the next place, information would be required respecting the decisions which have passed on their own recaptures; and if none such can be found, a certificate to this effect should be exhibited. But there is no certificate; besides, it is, I think, scarcely probable that there should not have passed some decisions on this subject previous to December, 1796. Portugal has been active in the war; and the enemy has been active on those coasts; recaptures must have occurred; they must also have been brought to adjudication, and the rule by which they have been decided, would have been considered by me as the law of Portugal.

It might have been expected, also, that authorities even more immediately in point might have been produced, from decisions respecting the recaptured property of allies; some instances cannot but have

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The Santa Cruz. 1 C. Rob.

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occurred previous to May, 1797, when an edict issued on that subject. Three cases have occurred within three months after the edict, and afterwards many more; and it is scarcely probable, that so many should have happened after that time, and none before. It has been suggested, that the records of Portugal are not so kept as to furnish a ready answer to such inquiries; but I cannot admit an excuse so dishonorable to the tribunals of that great country. There is therefore a defect of evidence, for which no sufficient reason has been given on the part of the claimants.

After this statement of the reasonable expectations of the court, let us now see what evidence has been produced; it consists of many documents, of which some must immediately be dismissed, as of no use or authority in \* this case. Of these, the first is [ \* 70 ] a certificate from the Portuguese minister plenipotentiary at this court. As far as character truly honorable both in public and private life, can give weight to an opinion; as far as a conviction, that the party delivering that opinion delivers the sincere and unbiased persuasion of his own mind, can influence me to respect it, this opinion must command the greatest attention; but the whole weight of this opinion is confined to these considerations; for it is to be remembered that the Chevalier d'Almeida is not a professor of the law, but a diplomatic character; and therefore incompetent to instruct us in questions of law.

Another paper, which I shall dismiss also, is an opinion of Mr. Da Sylva Lisboa, described to be a lawyer of considerable eminence in his own country. Upon this opinion many observations have been made, and more particularly on the impropriety, with which it undertakes to explain to us the British laws of recapture, whilst it almost pleads ignorance of the Portuguese laws on the same subject. It is scarcely necessary to observe, that the representation which it gives of our law is erroneous; it is, besides, very deficient in the preliminary circumstance which can alone give credit to it, or even make it intelligible to us; for it is not accompanied by any statement of the questions that were addressed to this gentleman. He could scarcely have imagined that the British Court of Admiralty would apply to Portuguese professors for information on British law; and we are at a loss to conjecture in what view he could suppose we should derive any knowledge of the law of Portugal from such an opinion; it would perhaps, therefore, be but due civility to the reputation of this gentleman, to \* consider it as an opinion hastily obtained, [ \* 71 ] on an imperfect representation of the case; and under this character, as it can avail nothing in point of authority, I would recommend it to those who may have to argue this cause again, if it should go to an appeal, to dismiss this paper wholly from the case.

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The Santa Cruz. 1 C. Rob.

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The last paper which I shall dismiss, is the certificate of Mr. Nash, a reputable merchant of this town. This paper relates something of a transaction that has happened to Portuguese masters accepting from the enemy, by donations, ships taken from the Portuguese, and states that "the enemy had captured a number of vessels, some Portuguese, some English; and willing to disencumber themselves of their prisoners, they gave to the Portuguese and English masters, jointly, one of the Portuguese ships. On carrying their present into Portugal, these persons are represented to have been severely treated, and to have been imprisoned by the government." I am at a loss to understand this account, when I recollect the cases of *The Anne* and *The Endeavour*, unless I am to suppose that this severity was practised on them subsequently to the last ordinance, which pronounced such donations null and void; for otherwise, I must suppose that donations of Portuguese property were considered void, whilst similar donations of British property were held to be perfectly good and valid. The same paper informs us farther, "that the Portuguese masters remitted to England, to the captains of the English vessels, a part of the proceeds as their share of the donation." I am sorry for it, because the property belonged not to either party, but to the former Portuguese owners; and no interest could accrue to those masters, but an ordinary salvage on restitution to the original proprietors.

This certificate cites, also, as a sort of precedent, the acceptance of four pipes of wine, in the same manner, by an English captain, Bennett. It would be ridiculous to treat the conduct of this man as an authority; it was an irregular proceeding, and as irrelevant to this case as the former parts of this certificate.

Laying aside, therefore, these several documents, I come now to examine those papers which may be considered as matter of evidence in the case. These are on the part of the claimants; 1st, Opinions of Portuguese lawyers; 2dly, A certificate of the judges of the Supreme Court of Admiralty in Portugal; 3dly, The decree of the queen of Portugal, November, 1797, in the case of *The Anne*; and 4thly, A certificate of the foreign Secretary of State of that country, Mr. Pinto de Souza. But it is scarcely possible to consider the effect of these documents, without bringing under our view those at the same time, which have been brought in by the captors; these are the ordinances of December, 1796, and of May, 1797; and the proceedings relative to the British ships, *The Anne* and *The Endeavour*.

In the ordinance of December, 1796, no mention is made of the recaptured property of allies. The ninth article refers only to their own recaptures; but a reasonable presumption arises from it, that

they would apply the same law to their allies; for this principle is not only liberal and just, but it is actually observed in the practice of England, France, and Spain; a presumption therefore arises, that Portugal would pursue a similar rule. But I think there are two \*circumstances which convince me, beyond mere pre- [\*73] sumption, that Portugal did act on this principle, and did mean to apply its own rule to the cases of allies. In the case of *The Endeavour*, which concerned the property of an ally, the sentence was in these words: "Having heard what has been alleged concerning the rule of twenty-four hours, it appears to us, that that rule serves only to regulate the right of actions arising on recapture." Now, certainly, if this rule on recapture did not apply to the property of allies, it would have been entirely irrelevant to discuss that rule in such a case. We may infer, therefore, I think, that the rule of twenty-four hours' possession was the rule of Portugal; and also that had the case of *The Endeavour* been considered as a case of recapture, it must have been governed and decided by that rule. The manner in which Portugal has acted on the last ordinance, confirms me also in supposing that it was the practice of Portugal, to extend its own rule to the cases of allies. The salvage there ordained for Portuguese property is one fifth, and this proportion has been observed also in subsequent cases of British property, although it is not the proportion of salvage which our own law prescribes. I may therefore conclude it was the practice of Portugal to apply its own law to the case of an ally.

But, it is said, this rule of twenty-four hours' possession had not prevailed in Portugal, before the ordinance of 1796; that ordinance, I must observe, professes to take for its basis the ancient ordinance of 1704; and, therefore, I may presume that ancient ordinance was fundamentally the same. Had there \*been a [\*74] difference so material, it was the duty of the claimant to have produced that ordinance for the information of the Court; and to have convinced us that the modern practice was a change and alteration in the jurisprudence of Portugal. It cannot, indeed, be supposed, that an alteration so monstrous, so gigantic, so opposite to the general course of the relaxations which have gradually taken place in the law of prize during this century, should have found its way into the courts of Portugal, and have been adopted by them for the first time in 1796; we know it to have been the ancient law of Spain. The vicinity of the two countries, their affinity of habits, the resemblance of their legal institutions, still farther strengthen the probability, that this rule had also been the ancient law, or at least the usage of Portugal on this subject.

I consider myself, therefore, justified to conclude, that the law of

Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner; and also, that it would have applied the same rule to the property of allies.

But I acknowledge it is not sufficient to say such a rule would have been applied. It is also necessary to show, that there have been actual proceedings under it; and for that purpose two cases have been produced: the cases of *The Anne* and of *the Endeavour*.

The case of *The Endeavour* was, I believe, prior in time. It was the case of a British ship taken by the French on the 24th of January, 1796. The French captain gave it to the master of a Portuguese vessel, which he had also taken. The ship was carried into Portugal. The English master demanded restitution; but it was denied to him, not only by the individual, but also by the courts of justice of [\*75] Portugal. \*The case of *The Anne* happened in September, 1796, and is in one respect still stronger than that of *The Endeavour*; as it was a ship given in the same manner by the French captor, to the very man who had been the master of this vessel, — *The Santa Cruz*. Let us suppose the master had been also the owner of *The Santa Cruz*; by what justice could he have claimed to have his own property restored from British hands, at the same time that his own law confirmed him in his refusal to restore British property, under circumstances precisely similar? But restitution, it seems, was refused, under a particular order of the State, which declared "the property of the English owner had been divested, and that the title of the Portuguese owner was good and valid."

Now these are two cases strongly in point; and unless they can be overthrown, they will, I think, sufficiently establish this fact — that it was the practice of the courts of Portugal, either under ancient ordinances, or under a silent but prevailing usage, or under some recent edict, to confiscate the property of allies coming into the possession of Portuguese subjects from the hands of the enemy. It is immaterial under which of these authorities the practice prevailed. These decisions are represented to us to be the only decisions that have passed, during the present war on that subject; and they, therefore, establish the law of Portugal, from whatever sources it might be derived.

But the force of these cases has been attacked in different ways.

It is said in the first place, that they were cases not of recap- [\*76] ture but of donation; and it \*has been attempted to raise distinctions between these titles. But in all legal considerations they are precisely the same; they are both equally matter of prize; donation between enemy and enemy cannot take effect. The very character of enemy at once extinguishes all civil intercourse,



from which such a title could arise. So distinctly is this rule acknowledged to be the law of this country, that if a case should happen, in which an enemy after capture had made a donation, as it is called, in this manner to the original owner, that vessel must be condemned as a *droit* or perquisite of Admiralty; and the original proprietor could acquire no interest but as *salvor*, or from the subsequent liberality of the crown.

I think I have evidence also that this matter is so considered in Portugal. In the certificate of the secretary, Mr. Pinto de Souza, he says, "the order given by him was not intended to suspend the suit of the English claimant, but only to dispose of that property which of right belonged to the queen, as being acquired from the enemy without letters of *marque*." It is then under this description, only the case of prize taken by a non-commissioned captor; and in this Mr. Pinto de Souza seems to coincide exactly with us, in the view in which we should have considered it here. It has been said, however, that the law of Portugal does distinguish between donations and recaptures; but it is sufficient to observe, that no proof has been produced of this assertion; and besides, it is a distinction which cannot in the nature of things reasonably exist; nor indeed should I consider myself by any means bound to pursue a \*foreign law [ \* 77 ] through a variety of minute and subtle distinctions, which at last perhaps might be found to exist only in theory. It would be sufficient for me to know, that I understand the practice, as it has been administered in the only cases that have occurred on this subject.

But, it is said, these cases were decided before an incompetent tribunal; although I believe this objection applies only to *The Endeavour*. This objection however does not appear to have been taken by the Portuguese lawyers. In the order of her sacred Majesty, it is said indeed, "the Council of Commerce had no jurisdiction to decide questions of this nature;" but the certificate of the judges speak a different language. They say, not that the jurisdiction was incompetent; but "that the sentence which had been given by the Board of Commerce was founded on frivolous and insufficient reasons, and that the party might have appealed." The terms used by them are just the terms which would be applied to cases proceeding in their due and ordinary course.

In the case of *The Anne*, it is not, I think, pretended that the court before which it was brought had not a competent jurisdiction; but it is argued against the British claimant, that he acquiesced in the decision, when he might have appealed. But let us see what must have been his prospect of success. The hope which the Portuguese law-

yers held out to him, is not founded on any opinion on the merits of his case, but on a point of form, "because the order of Council had not been produced." Whilst the cause was under investigation, the Supreme Authority of the State interposed, to inform the Court, that the title of the Portuguese master was legal and valid. The

[ \* 78 ] \* Court of Justice assents to this authority, and decides accordingly; and it is against a decision so deliberately pronounced, and so irregularly influenced by the supreme authority of the country, that this foreign claimant, the master of a small English vessel, is required to persevere. I must think it could not be expected of him.

Such are the observations which I think myself justified in making on the proceedings in these two cases. And after the general view which I have taken of the whole of this subject, it may be unnecessary to dwell more particularly on the minute parts of the several papers. It is, I think, clearly proved, that before the ordinance of May, 1797, the courts of Portugal considered British property coming out of the hands of the enemy as subject to confiscation. In two instances such property was actually confiscated, not by remote and inferior jurisdictions, but in their highest courts, in the capital of the empire, and under the direction of the State. The ordinance of 1797 cannot be applicable to preëxisting cases. I must determine all cases, as if they had come before me at the time of capture. The two former cases, therefore, of this class, can receive no protection from this ordinance.

Looking then to the conduct which Portugal had observed towards British property, and conceiving myself bound by the general law of this country, and more particularly by the authority of the case of *The San Iago*, to proceed on strict principles of reciprocity, I have no hesitation in pronouncing the first two cases subject to confiscation.

\* I now come to the consideration of the subsequent cases.

[ \* 79 ] It has already been laid down, that the law of England restores on salvage, unless it is forced out of its natural course by the practice of its allies. In the preceeding cases it has been reluctantly so diverted from its free course; but in May, 1797, it appears Portugal renounced the harsher principles, and adopted a more liberal rule. Upon what ground, then, can it be contended, that this country must, in regard to those cases which have occurred subsequent to this ordinance, follow the harsh and antiquated, in preference to the new and more lenient rule? It is said, Portugal is not at liberty to make such an alteration in time of war; and that those who have once established a rule, must abide the consequences of it; but I confess, I see no one reason on which this exercise of legislation can be denied to an independent State.

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The Mercurius. 1 C. Rob.

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It is said, Portugal will then legislate for this country. And so must every country in some degree legislate for us, whilst Great Britain professes to act upon the old principle, and adopt the law of its ally. In peace it is allowed, such an alteration might be made; and why not in a time of war? There are no depending interests to be affected by it; it was an alteration as harmless to the world, as if it had been made in times of the most profound peace. But, it is said, the law is not even now established on equal terms of reciprocity towards this country; the salvage which Portugal has decreed is one fifth, whilst the law of this country restores on payment of a sixth only. Perhaps a rule more closely concurring with our own might have been more convenient; but the difference is not sufficient to justify this country in refusing Portuguese subjects the benefit of their alteration. In professing to act on the law of our ally, we must do it for better and for worse.

I, therefore, restore the several vessels that have been taken since the ordinance of May, 1797, on the salvage which Portugal has established, a salvage of one eighth to ships of war, and one fifth to privateers.

In the condemned cases, I order the expenses of the claimants to be defrayed out of the proceeds.

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THE MERCURIUS, Gerdes, master.

December 10, 1798.

Restitution does not bar a second seizure, by other parties, either on the same or different evidence: but a second seizor would be subject to the risk of costs and damages.

Warning on the spot, sufficient notice of a blockade *de facto*; prohibition to go to Amsterdam, includes the Vlie passage as well as the Texel.

Violation of blockade by the master affects the ship but not the cargo, unless the property of the same owner, or unless the owner of the cargo is cognizant of the intended violation.

THIS was a case of a ship taken on a voyage from 'Baltimore to Amsterdam. The ship was claimed for a merchant of Hamburgh, and the cargo as the property of a citizen of the United States. On the first capture, the vessel had been restored by consent, but the officers of the Admiralty seized the ship again in the port of Yarmouth, and instituted new proceedings, August, 1798. The claimant now appeared under protest. On the part of the captors, Amsterdam was said to have been in a state of blockade, and it was contended, that the ship

and cargo were liable to confiscation for attempting to enter a blockaded port.

#### JUDGMENT.

SIR W. SCOTT. In this case three questions arise: first, Whether restitution by consent bars new proceedings? secondly, How far the ship is affected by an attempt to break a blockade? and thirdly, How far such a conduct will affect the cargo?

[ \* 81 ] On the first question I must say, that in restoring \* by consent in the present case, I think the party committed an oversight; such a consent judicially recorded, would bar him from a second seizure. Against other parties it could be no bar; but whoever ventures on a second seizure, must make it under the peril of costs and damages. A monition calls upon all claimants, but it does not call upon other captors, nor could a second seizure be made, nor could other parties intervene, as on a fresh seizure, till the proceedings under the first libel had been determined.

The king, in his office of Admiralty, is the second seizer in this case; and it is said, that as the fountain of all prize, he is to be considered also as the original captor. But the king holds the office of Lord High Admiral, in a capacity distinguishable from his regal character. Besides, although he is undoubtedly the fountain of prize, he has conveyed away his interests in it to various persons; to the commanders and crews of his own ships; to his other subjects by letters of marque, and to the Lord High Admiral of England.<sup>1</sup> It has been declared by high authority, that the interest of prize is vested in the captor, and that captors may, against the wish of the crown, proceed to adjudication.

The case of *La Paix* <sup>2</sup> does, I think, sufficiently support [ \* 82 ] the principle for which it has been \* cited.<sup>3</sup> In that case new depositions were taken; but the second seizer might in that instance have proceeded, if he had thought proper, on the original evidence. It is said here, that proceedings should have been by

<sup>1</sup> [See a copy of the orders in *The Rebecca*, 1 C. Rob. 230 n.]

<sup>2</sup> This was a case of a ship carried into St. Kitt's, and restored, and immediately afterwards seized by another privateer, who followed her out of the harbor, took her to the island of Nevis, and there obtained a condemnation. The illegality of a second seizure, after restitution, was strongly argued, on appeal; but the Lords decided on the merits, saying, "As the captors can only now contend for farther proof, we are of opinion, that will not be sufficient in this stage, although if this case had been appealed from the first judgment, we should have been disposed to order farther proof." Costs were given against the captor, for misconduct.

<sup>3</sup> Lords, July 80, 1796.

appeal, instead of a second seizure; but there was nothing in the possession of the Court. The proceedings, therefore, by a second seizure, were, in my opinion, not only regular but necessary, and the only means which could have been pursued. I, therefore, overrule the protest, and assign the claimant to appear absolutely.<sup>1</sup>

On the second question, it is necessary to inquire, Was there an actual blockade? Was it notified? Was it violated? If all these points can be established, confiscation must necessarily follow. It is the necessary consequence acknowledged in all books, and confirmed by the practice of all nations; nor is it even denied in theory, to be a just penalty by those who have labored to extend to the utmost, the rights of neutral nations.

By the evidence it appears, that when the vessel approached the Texel, the master was warned by the officer who boarded her, that he must not go into the Texel. The officer wrote on the manifest, "Hindered from going into the Texel." The inability of the master to proceed into the Texel, therefore, proves the [ \*83 ] blockade; for a blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it.<sup>2</sup>

It has been so determined by the Supreme Court during the present war. The West India islands were declared under blockade by Admiral Jarvis; but the Lords held, that as the fact did not support the declaration, a blockade could not be deemed legally to exist; but the fact, on the contrary, duly notified on the spot, is of itself sufficient; for public notifications between governments can be meant only for the information of individuals. But if the individual is personally informed, that purpose is still better obtained than by a public declaration. Allusion has been made to the notification given to the Swedish government, but I think irrelevantly; for the only declaration to which the claimant can allude, must be one that has been made to his own government.

Much has been said about the purposes of blockade, which I do not think material to the case. I shall, therefore, pass it over, and

<sup>1</sup> In 1626, it was one of the charges brought against the Duke of Buckingham, that, as Lord High Admiral, he had ordered a second seizure of a Spanish ship, *The St. Peter*, in the river, after it had been restored by the Court of Admiralty. In the Duke's answer and defence, the particular circumstances are detailed. It is stated to have been done, on a discovery of fresh facts, by the direction of the king, and after reference to the Judge of the Admiralty, and a consultation of the most eminent civilians, respecting the legality of a second seizure, after a discharge in the Court of Admiralty. See Rushworth's Hist. Coll. vol. 1. p. 382.

<sup>2</sup> [*The Neptune*, 1 C. Rob. 170; *The Betsey*, 1 C. Rob. 98.]

proceed to consider what the master himself understood by the notification which he received; and whether he really thought, that though he might not go into the Texel, he was at liberty to get to Amsterdam by any other course. It appears that he asked the officers who boarded him, whether he might go to other Dutch ports; other, as must be understood, than the object of his destination. It was never inquired whether he might go to Amsterdam by any other course. The master pretended to be proceeding to Hamburg, till he came to the passage into the Zuyder Zee, and then he attempted to enter

[ \* 84 ] \* it. How far the blockade might extend to all the ports in the Zuyder Zee I shall not now inquire, because I am sufficiently convinced that the intention of this master was to proceed to Amsterdam, in defiance of the prohibition, which he distinctly understood. Perhaps the officer might have expressed himself more clearly than he did; but if there had been any thing insidious, in the manner of giving this intimation, I should have thought it my duty to protect the neutral from suffering loss or inconvenience under it.

It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it.

On the third point, to maintain that the conduct of the ship will affect the cargo, it will be necessary either to prove that the owners were, or might have been, cognizant of the blockade, before they sent their cargoes; or to show, that the act of the master of the ship personally binds them. In America, there could not have been any knowledge of the blockade. The cargo is innocent in its nature, and sets out innocently. The master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance, and in revenue

[ \* 85 ] cases, where, it is said, the act of the master will affect the cargo, it is to be observed, that the ground on which they stand, is wholly different. In the former, it is in virtue of an express contract which governs the whole case; and in revenue cases it proceeds from positive laws, and the necessary strictness of all fiscal regulations.

It is argued, that to exempt the cargo from this responsibility will open the door to fraud, if neutrals are allowed to attempt to trade to blockaded ports with impunity, by throwing the blame upon the car-

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The Frederick Molke. 1 C. Rob.

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rier master; but if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation; and it would at the same time be sufficient to cause the master to be considered in the character of agent, as well for the cargo, as for the ship.

Where a cargo is of a contraband nature, it will perhaps justify greater severity; but in cases of contraband it is held, that innocent parts of the cargo, belonging to other owners, shall not be infected.<sup>1</sup> This is, I think, a parallel case. There is misconduct on the part of the owner of the vessel, but none in the owner of the cargo.

If the evidence of the property of the cargo was sufficient, I should restore that; but as the case now stands, if the captors demand farther proof on that point, it must be supplied.

Ship condemned.

August 7th, 1799. The cargo was restored on farther proof.

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\* THE FREDERICK MOLKE, Boysen, master. [° 86 ]

December 10, 1798.

A vessel coming out of a blockaded port, with a cargo, is *prima facie* liable to seizure. If the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation.<sup>2</sup>

This was a case of a Danish vessel, taken coming out of Havre on the 18th of August, 1798, and bound on a voyage from Havre to the coast of Africa, with a miscellaneous cargo.

#### JUDGMENT.

SIR W. SCOTT. In this case a claim has been given for the ship and cargo, as the property of the same person, a Danish merchant of Christiana.

Several questions have been raised, respecting the property, the previous conduct of the vessel, the legality of this sort of trade, and the actual violation of a blockade. I shall first consider the last question, because if that is determined against the claimant, it will render a discussion of all other points unnecessary.

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<sup>1</sup> [The Stadt Embden, 1 C. Rob. 30.]

<sup>2</sup> [The Adonis, 5 C. Rob. 256.]

First, then, as to the blockade, these facts appear in the depositions of the master, "that on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruisers; that he was warned by an English frigate, The Diamond, off Havre, not to go into Havre, as there were two or three ships that would stop him; but that he slipped in at night and delivered his cargo." It is therefore sufficiently proved that there were ships on that station to prevent ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to [ \* 87 ] prevent communication, \* and a due notice, or prohibition given to the party.<sup>1</sup>

But it is still further material, that this blockade actually continued till the ship came out again. It is notorious, indeed, that Havre was blockaded for some time; and although the blockade varied occasionally, it still continued; for it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind, (if the suspension, and the reason of the suspension are known,) that will be sufficient in law to remove a blockade.<sup>2</sup>

It is said, this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage. But is there that analogy between the two cases which should make the law of one necessarily or in reason applicable to the other also? I cannot think there is such an affinity between them. There is this essential difference, that in contraband, the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

For what is the object of blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded [ \* 88 ] \* place. I must therefore consider the act of egress<sup>3</sup> to be

<sup>1</sup> It has since appeared that the blockade of Havre was notified to foreign ministers on the 23d of February, 1798.

<sup>2</sup> [The Columbia, 1 C. Rob. 154, 156; The Hoffnung, 6 C. Rob. 112, 117.]

<sup>3</sup> Such is also the law and the practice of Holland. Bynkershoek, commenting on the orders of the States General, June 26, 1630, says, "*Scilicet commercii intercludendi ergo ordines generales portus Flandriæ navibus bellicis obsederant, adeoque omnes quorumcunque naves eo destinatas, indique exeuntes publicabant; quemadmodum ex ratione, et gentium usu, urbibus obsessis nihil quicquam licet advehere, vel ex his evehere.*" Bynk. Q. J. P. book i. c. 4.



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The Ringende Jacob. 1 C. Rob.

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as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

There may, indeed, be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, that they might not be at liberty to retire.

But even then a question might arise, if it was attempted to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade.<sup>1</sup>

A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intention. In the present case, the ingress was criminal, and the egress was criminal, and I am decidedly of opinion that both ship and cargo, being the property of the same person, are subject to confiscation.

Condemned.



\* THE RINGENDE JACOB, Kreplien, master. [ \* 89 ]

December 11, 1798.

Freighting a ship to the enemy is not the lending mentioned in the Swedish treaty, Oct. 21, 1666. A contraband cargo alone will not affect the ship, being the property of a different owner. Hemp is contraband under the Danish treaty. Unwrought iron is an article of *promiscui usus*.

#### JUDGMENT.

SIR W. SCOTT. This is a case of a ship under Swedish colors, laden with iron, hemp, tobacco, and oak logs, and taken on a voyage from Riga to Amsterdam, on the 15th of August, 1798.

The ship is claimed as Swedish property; the iron for Russian merchants; the hemp appears to be the produce of Russia; but it is claimed for a Danish subject; and some parts of the cargo remain still unclaimed. Objections have been made against the proofs of property as standing chiefly on the evidence of the master, whose conduct, it is said, has shown him to be unworthy of credit; but I think the property is sufficiently proved.

Three other grounds, however, have been taken, on which it is contended, that the vessel is liable to condemnation: 1st, on ac-

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<sup>1</sup> [See *The Vrow Judith*, 1 C. Rob. 150, 152.]

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The Ringende Jacob. 1 C. Rob.

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count of the use and occupation in which she was employed; 2d, on account of the contraband nature of the cargo; and 3d, for violating a blockade.

On the former point, reference has been made to an ancient treaty between England and Sweden,<sup>1</sup> which forbids the subjects of either powers "to sell or lend their ships for the use and advantage of the enemies of the other;" and as this prohibition is connected in the same article with the subject of contraband, it is argued, that the carrying of contraband articles in the present cargo, is such a [ \* 90 ] lending as comes within the meaning of the treaty; but I cannot agree to that interpretation. To let a ship on freight to go to the ports of the enemy, cannot be termed lending, but in a very loose sense; and I apprehend the true meaning to have been, that they should not give up the use and management of their ships directly to the enemy, or put them under his absolute power and direction. It is besides observable that there is no penalty annexed to this prohibition. I cannot think such a service as this will make the vessel subject to confiscation.

But it is said, there is a contraband cargo. That there are some contraband articles cannot be denied. Hemp, the produce of Russia, exported by a Danish merchant, would be confiscable even under the relaxation, which allows neutrals to export that article, only where it is of the growth of their own country;<sup>2</sup> but to a Dane hemp is expressly enumerated among the articles of contraband in the Danish treaty;<sup>3</sup> and to say that a Dane might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. The hemp must certainly be condemned; but I do not know that under the present practice of the law of nations, a contraband cargo can affect the ship.

By the ancient law of Europe such a consequence would have ensued; nor can it be said, that such a penalty was unjust, or not supported by the general analogies of law; for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, and I believe of other nations also, a milder rule has been adopted; and the carrying of [ \* 91 ] contraband articles is attended only with the loss of freight and expenses; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying

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<sup>1</sup> Treaty, Oct. 21, 1661, art. 11.

<sup>2</sup> [The Appollo, 4 Rob. 158.]

<sup>3</sup> Ad. art. July 4, 1780.

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The Ringende Jacob. 1 C. Rob.

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a contraband cargo, has been connected with other malignant and aggravating circumstances.<sup>1</sup>

The case which has been cited by the king's advocate, by no means establishes the contrary;<sup>2</sup> that was a case attended with particular circumstances of falsehood and fraud, both as to the papers and the destination of the voyage. It was attempted under colorable appearances to defeat our right of preëmption; and under a view of all these circumstances together, the court judged it to be subject to confiscation; but I am not disposed to consider that decision as a general authority, in other cases of cargoes, simply contraband.

On the question of blockade, a doubt arises whether the master had received due notice of it; there appears not to have been any previous admonition at the time of capture. The notice, therefore, if any, must have been under the public declaration. The vessel left Riga on the 2d of July, 1798; the notification of the blockade of Amsterdam to the foreign ministers was made here on the 11th of June. It might have reached Riga before this ship sailed, and I think the probability is on that side; but I cannot take it as an established fact; I shall therefore order affidavits to be produced on that point.<sup>3</sup> With regard to the cargo, the hemp is undoubtedly contraband, and subject to confiscation; but it is disputed whether iron in bars is to be considered as wrought or unwrought; or whether or not it is to be ranked amongst naval stores.

\* There is perhaps no article in nature that comes more [\* 92] exactly under the description of an article of promiscuous use than iron; it is a commodity subservient to the most infinite variety of human uses. As this cargo is going to a port of naval equipment, it would very probably be applied as a naval store; but it may be too much to decide merely on this inference, that it is an article absolutely hostile. Nor can I agree to another argument that has been advanced, that, because unwrought iron is excepted, in some treaties, as not contraband; therefore, where no exception is expressed, it is to be considered as contraband. Enumeration takes place in treaties, to prevent misunderstanding; it distinguishes what shall be contraband from what shall not; but the exception of particular articles is not to be there understood in the strict sense, in which it is sometimes said, *exceptio confirmat legem*.

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<sup>1</sup> [The Mercurius, 1 C. Rob. 288; The Jonge Tobias, 1 C. Rob. 329; The Sarah Cristina, 1 C. Rob. 237; The Franklin, 3 C. Rob. 217 and note, p. 221; The Neutralitet, 3 C. Rob. 295; The Edward, 4 C. Rob. 68; The Ranger, 6 C. Rob. 125; The Floreat Commertium, 3 C. Rob. 178; The Richmond, 5 C. Rob. 325.]

<sup>2</sup> The Eliza. Holtz, Adm. July 3, 1794.

<sup>3</sup> [As to what time will be sufficient, see the Calypso, 2 C. Rob. 298.]

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The Betsey. 1 C. Rob.

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There is besides a doubt in my mind what is at the present moment the relative situation of Russia and Holland; I do not know that Russia is so far engaged as a principal in hostility with Holland, as to cut off all communication of trade between them. This is an important point which I shall reserve for farther inquiry and information. In the mean time, it will be equally necessary that the owners of the cargo should prove themselves not to have received notice of the blockade. It will be proper also to refer the iron and the oak timber to the inspection of the officers of the king's yards, that we may be assisted by their certificate, in determining whether they are to be considered as naval stores or not.

February 22, 1799. This ship was condemned on proof [ \* 92a ] that the ship left Elsineur, on the 19th of \* July, 1798; it being held that the master must therefore be taken to have received notice of the blockade.

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[ \* 93 ]                      \* THE BETSEY, Murphy, master.<sup>1</sup>

December 18, 1798.

A declaration of blockade by a commander without an actual investment will not constitute blockade.

In a case of neutral property captured by the English and recaptured by the French, compensation was sued from the original British captors, but refused, on the ground of a *bonæ fidei* possession; irregularities to bind a former captor being a *bonæ fidei* possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.<sup>2</sup>

THIS was a case of a ship and cargo, taken by the English, at the capture of Guadaloupe, April the 13th, 1794, and retaken, together with that island by the French, in June following. The ship was claimed for Mr. Patterson of Baltimore; and the cargo as American property. The captors being served with a monition to proceed to adjudication, appeared under protest; and the cause now came on upon the question, Whether the claimants were entitled to demand of the first British captors, restitution in value, for the property which had passed from them to the French recaptors? The first seizure

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<sup>1</sup> [Affirmed on appeal, June 22, 1799.]

<sup>2</sup> [See *post*, p. 96, notes.]

was defended on a suggestion that The *Betsy* had broken the blockade at Guadaloupe.

**JUDGMENT.**

SIR W. SCOTT. This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade; and then proceed to inquire on whom the loss of the recapture by the French ought to fall, under all the circumstances of the case.

On the question of blockade, three things must be proved: 1st, The existence of an actual blockade; 2dly, The knowledge of the party; and, 3dly, Some act of violation, either by going in, or by coming out, with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, \*a [\* 94 ] neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.<sup>1</sup>

It is necessary, however, that the evidence of a blockade should be clear and decisive; but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe, to put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all;" but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is farther stated, "that in January, 1794, (but without any more precise date,) Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The word "complete" is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round the entrance of the port to cut off all communication; but from the protest I perceive, that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands, they were put into a state of complete blockade." It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

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<sup>1</sup> [See the *Vrow Judith*, 1 C. Rob. 152, note.]

[ \* 95 ] \* The lords of appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors erroneously ascribe to it; but from the misapplication of these phrases in one instance, I learn that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions, I think we must infer, that there was not that actual blockade, which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in that state of investment, from a foreign enemy, which we require to constitute blockade. I cannot, therefore, lay it down, that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe, in April.

It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it; but this is expressly denied by the master. He went in without obstruction.

Mr. Incledon's statement of his belief of the notoriety of [ \* 96 ] the blockade is not such evidence as will \* alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in. I shall therefore dismiss this part of the case.

The case being on the first point pronounced a case of restitution, a second point arises out of the recapture of the property by the French; and the question is, whether the original captors are exonerated of their responsibility to the American claimants? It is to be observed, that at the time of recapture, America was a neutral country, and in amity with France. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal *bonæ fidei* possession? and, 2dly, whether such a possession, being just in its commencement, became afterwards by any subsequent conduct of the captors, tortious and illegal? for on both these points the law is clear, "that a *bonæ fidei* possessor is

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The Betsey. 1 C. Rob.

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not responsible for casualties;<sup>1</sup> but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning.”<sup>2</sup> This is the law, not of this court only, but of all courts, and one of the first principles of universal jurisprudence.

The cases, in which it has been particularly applied in this court have been cited in the arguments; and I will briefly advert to the circumstances of them, as they will afford much light to direct us in the present case.<sup>3</sup> The *Nicolas* and *Jan* was one of several Dutch ships taken at St. Eustatius, and sent home under [\* 97 ] convoy to England for adjudication. In the mouth of the channel they were retaken by the French fleet; there was much neutral property on board, sufficiently documented; and in that case a demand was made on behalf of a merchant of Hamburgh, for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger, by bringing it home, whilst they might have resorted to the Admiralty Courts in the West Indies; and, therefore, that the claimants were entitled to demand indemnification from them; but on this point the court was of opinion that, under the dubious circumstances in which those cases were involved, and under the great pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion, which is necessarily intrusted to them by the nature of their command.

It was urged also against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on these grounds our courts rejected their claims.

In the *Hendrick* and *Jacob* also,<sup>4</sup> the case turned upon similar considerations of the nature of the possession. It was a case of a *Hamburghese* ship, taken erroneously as Dutch, and retaken by a French privateer. In going into *Nantz* the vessel foundered and was lost. On demand for restitution against the original British captor, the Lords of Appeal decided, that as it was a seizure made on unjustifi-

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<sup>1</sup> [The *John*, 2 Dod. 339; The *George*, 1 Mason, 24, 34; The *William*, 6 C. Rob. 316. As to restitution, see note to the *Acteon*, 2 Dod. 52; The *Providentia*, 2 C. Rob. 149. n.]

<sup>2</sup> [The *Speculation*, 2 C. Rob. 293; The *John*, 2 Dod. 339; The *Lively*, 1 Gall. 29; The *George*, 1 Mason, 24, 34; The *William*, 6 C. Rob. 316; The *Maria*, 4 C. Rob. 348; The *Concordia*, 2 C. Rob. 102 and note; The *Wilhelmsburg*, 5 C. Rob. 143.]

<sup>3</sup> Adm. March 5, 1784.

<sup>4</sup> *Hendrick* and *Jacob*; Lords, July 21, 1790.

able grounds, the owners were entitled to restitution from some quarter; that, as the French recapture had a justifiable possession [\* 98 ] under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands; that if the property had been saved, indeed, the claimant must have looked for redress to the justice of his ally the French; but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. Under a view of these precedents, we must inquire first into the nature of the original seizure in the present case; whether it was so wrongful as to bring upon the seizer all the consequences of that strict responsibility which attaches to a tortious and unjustifiable possession?

It has been rather insinuated than affirmed openly in argument, that there was any thing wrong or unjustifiable in the first capture; but it is said, the great injustice arises from the detention, and from that irregularity of conduct in the captors which has put it out of the power of the claimants to support their claim, and obtain restitution from the French.

In respect to the first seizure, although it is admitted now that there was not a blockade; yet it must be allowed also on the other side, that the island of Guadaloupe was at that time in a situation extremely ambiguous and critical. It could be no secret in America that the British forces were advancing against this island; and that the planters would be eager to avail themselves of the interference of neutral persons to screen and carry off their property. Under such a posture of affairs, therefore, ships found in the harbors of Guadaloupe must have fallen under very strong suspicions and have become justly liable to very close examination. The suspicion besides [\* 99 ] would be still farther aggravated, if it appeared, as in this case it did appear, that those for whom the ships were claimed, kept agents stationed on the island; and might, therefore, be supposed to be connected in character and interest with the commerce of the place. It is true, indeed, the Lords of Appeal have since pronounced the island to have been not under blockade; but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise.

The same considerations which justify the seizure, apply also to the second charge of detention in this case; for under these suspicions and these doubts, it was not a slight examination of formal papers that could be deemed sufficient. The captors were entitled to reserve the property so taken for legal adjudication; and as they could not



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The *Betsy*. 1 C. Rob.

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erect a jurisdiction on the spot, so neither were they at leisure then to send the cases to distant courts. The first capture was made April 13; the recapture took place so early as the 2d of June following; there was an interval but of six weeks. The French were, as the subsequent event proves, in great force in those parts; the commanders had much to occupy their attention; the number of vessels taken under these circumstances, was very considerable; and, therefore, it is not to be mentioned as an injurious or unnecessary delay, that in six weeks, so employed, no means were found to bring the ships to adjudication.

But it is said, the irregular proceedings of the captors have rendered them liable to the strictest responsibility. Now, on this point I must distinctly lay it \* down, that the irregular- [ \* 100 ] ities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the British captor for indemnification; but, till this is proved, the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these courts to exonerate the original captors.

What then has been the nature of these irregularities? It is said, that the masters and proprietors were sent away from their ships; and, therefore, that there was no one to apply for restitution at the time of recapture. But what was there to prevent them from making these applications afterwards? Are the French more than the English courts exempted from making subsequent restitution? They hold, indeed, that possession of twenty-four hours will convert the property of prize; but this is not applicable to a neutral vessel. So strongly did the maritime jurisprudence of ancient France consider neutral property to be in a state of absolute inviolability, that no salvage was allowed, on retaking neutral vessels, on the supposition that no service had been rendered to them. Such was the language of their law; and, therefore, no bar to restitution can have arisen from the impossibility of making immediate application.

It is said farther, that the papers were all thrown confusedly together; by which it was put out of the power of the claimants to produce that proof and those documents which the courts of France require.

I know it was a maxim of the French law, and a maxim not deficient in justice, that if in time of war \* a ship is found [ \* 101 ] sailing about the world without any credentials of character, she is liable to confiscation; but if a just reason could be given for this defect, if accident or force could be shown to have stripped her

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The Bernon. 1 C. Rob.

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of these documents, can it be conceived that the general rule would be applied to such a case? Unless the courts of France have renounced every principle of justice, such a consequence could not have ensued from the want of documents in these cases; and, therefore, it is not in reason to be presumed. Supposing these irregularities to have existed, and in the censurable degree which this argument imputes to them, they have not in any manner taken off the obligation which the French lie under to restore this property. I must determine that they would not, under any proceedings of justice, have prevented restitution from the French.

On no other ground can the proprietors be entitled to claim it from the British. If the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice. I must pronounce the protest to be well founded, and the captors to be discharged from any farther proceedings.

*Laurence* said there was a quantity of silver on board which had not been retaken.

*King's Advocate.* After what has fallen from the court, I cannot object to the restitution of the specie.

June 22, 1799. This cause was reheard before the Lords of Appeal. The sentence of the court below was affirmed.

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[\*102]

\* THE BERNON, Dunn, master.

December 19, 1798.

The purchase of an enemy's vessel in time of war, is liable to great suspicion. The suspicion is increased when the asserted neutral purchaser appears to be personally residing in the enemy's country at the time of sale. Defect of proof. Condemnation.<sup>1</sup>

THIS was a case of a ship and cargo, taken 29th of August, 1796,

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<sup>1</sup> [See *The Welvaart*, 1 C. Rob. 122; *The Argo*, 1 C. Rob. 158; *The Vigilantia*, 1 C. Rob. 13; *The Schr. Geschwistern*, 4 Rob. 100; *The Vigilantia*, 6 C. Rob. 122; *The Embden*, 1 C. Rob. 17; *The Juffrow Anna*, 1 C. Rob. 125; *The Hoffnung*, C. Rob. 162; *The Minerva*, 6 C. Rob. 396; *The Lucy*, 1 Edw. 122; *The Potsdam*, C. Rob. 89.]

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The Bernon. 1 C. Rob.

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on a voyage from Bordeaux to Hamburgh, and ordered for farther proof on a former day.

**JUDGMENT.**

**SIR W. SCOTT.** This is a ship asserted to have been purchased by an American, in France, during the war; such purchases have been allowed to be legal, but they will always be obnoxious to much suspicion; the court will always feel it to be its duty to look into them with great jealousy, and it will do this strictly, even in purchases made under commission, for neutrals resident in their own country. But the suspicion will be still farther increased, and the court will exert its utmost power of research, where it appears that the pretended neutral purchaser was a person then resident in France; for the court cannot be ignorant of the necessity which the French have felt of covering their trade, nor of the system of collusion practised for that purpose; but still greater suspicion will arise, if the ship so purchased, immediately engages in the commerce of France, and continues in the hands of the French proprietors.

Attending to these considerations, let us examine this purchase, asserted to have been made at Bordeaux, in May, 1796, by a person then in France, by Mr. Dunn, the present master; and let us see what has been her employment. She had made one voyage before this, according to the master's account, from Bordeaux to Hamburgh, with wines; a destination perfectly neutral, although not, as we might naturally have expected, to her own country. But [ \* 103 ] is this true? All the other witnesses say, "they went from Bordeaux to Brest," and this account is also confirmed by what appears in a paper found on board.

Now I ask, this fact being proved, that she was engaged in the navigation of France, to a port of naval equipment, with supplies, to the nature of which I cannot be inattentive, What is the consequence? It leads immediately to this conclusion, that the master is a person discredited, and not entitled to any belief; for it is a point on which he could not err by mere mistake. It cannot be said here, (as it is sometimes said), that he was ignorant of the language in which he was examined. English is his vernacular tongue; and when he swears that his last voyage was to Hamburgh, he swears to that which he knows to be false.

The employment of a vessel is, *in limine*, a point very proper for inquiry; for it may impress a national character,<sup>1</sup> and must at all events in such a case as this, very much elucidate the transaction. As to the property, — one witness, Mr. Alliston, says, "he believes Chanon, a person at Bordeaux, to be the owner, because he came often on

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<sup>1</sup> [See note to *The Vigilantia*, 1 C. Rob. 1, 15.]

board, and acted as owner; and because, on the misbehavior of a Lascar sailor, complaint was made to Mr. Chanon." Other witnesses "believe Dunn to have been the owner;" but they give no reason for their belief.

The documents were deficient; there was no bill of sale; the vessel had been a prize ship; yet there was no proof of condemnation.

The only documentary evidence that was on board, was a [ \* 104 ] certificate \* of property, on oath, before the American consul,

Mr. Fenwick, a person whose office is highly respectable. But men in office must themselves respect the duties of that office, if they mean that it should entitle them to the respect of others; and it has appeared in some cases, that Mr. Fenwick has not been always very correct in the recollection of this important truth. So circumstanced, the case originally stood very naked of proof; and the court gave the parties an opportunity of bringing farther evidence, both as to the national character and the property of the vessel.

Now, first, wherever it appears that the purchaser was in France, he must explain the circumstances of his residence there; the presumption arising from his residence is, that he is there *animo manendi*, and it lies on him to explain it; and, 2dly, to satisfy the court fully on this business, the claimant ought to be prepared to meet the presumption which arises, as to the property, on the face of the transaction; and which is confirmed by the evidence of Mr. Alliston. This he was bound to accomplish. In what manner is it performed? He swears "that he resided at Boston fourteen years, when at home;" but he does not say how often he had been at home. He then states, "that being at Bordeaux in 1796," &c.; but he does not say how long he had been there; he might have lived there a long time. The *onus probandi*, I have said, lay upon him; and the presumption is not rebutted by the asserted residence of his wife and family at Boston. It

is said, his wife lives in America; but he may have been [ \* 105 ] in Europe during the war, \* engaged in the trade of France;

and if so, such an occupation would supersede his pretended neutral character.

The account then states, "that part of the purchase-money was paid, and the rest was to be paid on his return from his first voyage." This is represented as an excuse for his return to Bordeaux; to which place he was to return, whether he obtained a freight or not. But his return appears not to have been for one time singly; and, besides, it cannot account for his strange deviation from truth in his depositions. "On his return to Bordeaux, he brought some papers on board from his lodgings;" so that he appears to have had a continued residence there during the interval of his voyages. Under these cir-

circumstances, I cannot say I am satisfied. I do not mean to lay down so harsh a rule, as that two voyages from France shall make a man a Frenchman. I do not say that; but this claimant being called upon for farther proof, and having an opportunity given to him of making out his case in a satisfactory manner, I must say he has not done it.

With respect to the sale, the evidence produced consists only of a formal bill of sale, in which Chanon, the person mentioned by Mr. Alliston, is the vendor; and of a note given by the master to pay part on his return, and of a receipt. How are these verified? It is said, "by the signatures of American houses." All that they attest is, that their signatures affixed are true; but, as to the transaction, they do not take upon themselves to verify that. It is not my business to say what precise proof a man is to bring to verify a purchase; but it might have been some satisfaction if \*the [ \* 106 ] American houses had certified their belief of a *bond fide* transaction. The claimant might have shown his funds. I do not know that the enemy vendor's attestation might not have been received; *valeat quantum valere potest*; or there might have been some negotiation shown. As it is, it all stands on Mr. Dunn's affidavit; and when I look back to his misstatement of the destination I cannot say that he makes full faith for such a public instrument.

I need not look to the other part of the case, to the employment of the vessel. I am disposed to give him the benefit of the admission, that the employment of this vessel would not be sufficient to bind upon it a French character. What shall I do then? Shall I order farther proof? It is enough to have permitted it once, the party having had a full opportunity of proving his claim, and having failed to satisfy the court, it is time to shut the door.

With respect to the cargo, the court must have farther satisfaction. In the original evidence, there was a bill of lading, expressing account and risk of the claimant. One witness says, "Peters of Bordeaux was the lader, and that the goods were to be delivered at Hamburgh for his account and risk, as he believes; that Peters said to him, when he expressed fears that it might be French property, it was his, and he was as good a neutral as himself." This is the account of one witness; and there seems to be no reason to induce him to swear falsely. Another witness, Mr. Alliston, believes the cargo was to be delivered at St. Maloes.

The proof now produced is such as, it is said, would be held good in ordinary cases; it consists of \*attestations, [ \* 107 ] letters of orders and advice, invoices, and bills of lading; but in cases so particularly circumstanced, something more must be re-

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The Dankebaar Africaan. 1 C. Rob.

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quired; it is possible that there might be such documents as these if the transaction was fictitious. There is a reference made to a letter of the 25th of June; I have a curiosity to see that. The insurance would throw some light on the destination. If there was none made, that may be certified.

Ship condemned. Further proof ordered, of the cargo.

The *King's Advocate* prayed that there might be attestations of the confidential clerks.

COURT. I have no objection; it is a case loaded with suspicion.

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THE DANKEBAAR AFRICAAN, Smit, master.

December 19, 1798.

Property sent from a hostile colony cannot change its character *in transitu* although the owners become British subjects by capitulation before capture.

THIS was a case of a Dutch ship, bound from Batavia to Holland, and taken on the 6th of November, 1795, about seven leagues to the southward of the Cape of Good Hope. On coming to the Cape of Good Hope, a claim was given on the part of Goetz and Vos, inhabitants of the Cape, and then become subjects of the crown of Great Britain. The cargo had been delivered to them on bail to answer adjudication.

*King's Advocate* for the captors. This is a ship going from Batavia to Holland, and claimed by merchants at the Cape. The evidence of property is not full; but the principal question is, whether, allowing the property to be proved, the claimants, can receive any [ \* 108 ] \* protection, as to this part of their property, from the capitulation under which they became British subjects, September 15, 1795.

The ship sailed from the Cape to Batavia the 21st of May, 1795, and was taken on her return to Holland on the 6th November. She sailed in a hostile character, and under the authority of a well known case in the last war, *The Negotie en Zeevaart*,<sup>1</sup> it is now clear that a ship cannot change her character *in transitu*.<sup>2</sup>

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<sup>1</sup> Lords, July 18, 1782.

<sup>2</sup> [See *The Vrow Margaretha*, 1 C. Rob. 338, 339 notes; *The Abby*, 5 C. Rob. 251.]

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The Dankebaar African. 1 C. Rob.

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On the 21st of May, it must have been known at the Cape what was the state of Holland; that the Stadtholder had left it, and that the country was in possession of the French. The ship was dispatched as a Dutch ship, with directions to make a vigorous resistance against cruisers; that is, as it must have been meant, against English cruisers. With respect to the intermediate capitulation, September 15th, nothing is more clear, than that the general articles, protecting the property of inhabitants, apply only to such property as is then within the colony, and not to any other which they may possess elsewhere. On the surrender of a colony, all property devolves to the conquering power; the protection arises as exceptions under capitulation and it is not to be extended beyond the terms of the articles.

The inhabitants do not stand as British subjects in all respects. They are under no obligation to continue there, nor are they obliged to serve in our fleets or armies; they are protected only in possession of their property, and no farther. The terms of capitulation in the case of *De Negotie en Zeevaart*, were as favorable as in this case, and indeed stronger. The authority of that case is conclusive; and under it \* this ship and cargo are subject to immediate [ \* 109 ] condemnation.

For the claimant, *Laurence*. The principles which have been laid down, that, although a colony surrenders, and the inhabitants swear allegiance to the crown, yet all the property belongs to the crown, which is not particularly protected, are principles of a very dangerous nature. On conquest, all belongs to the conquering party; but when subjects come under protection, the property which is not seized, remains quiet; and it is not to be pretended, two or three months afterwards, that this or that part of their property was not on the spot at the time; and, therefore, that it may be seized and confiscated. The 5th article of the capitulation states, "all private property of civil or military servants of the colony, churches, &c., shall remain free and untouched." On capitulation, and on taking the oath of allegiance, a colony is supposed to acquire generally the right of British subjects.

The case of *The Negotie en Zeevaart* is distinguishable in many points from the present case. This property was dispatched in May, whilst Holland had not ceased to be an ally of this country. France had taken possession of Holland in January; but still this country did not think it expedient to declare hostilities, and the real character of the two countries remained dubious. Shall persons who dispatch vessels, supposing themselves to be allies at the time of sailing, and being actual subjects at the time of capture, become liable to confiscation

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The Danckebaar Africaan. 1 C. Rob.

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by reference to intermediate time? It by no means follows from any thing which was laid down in the case cited, where all that [ \* 110 ] was determined was, that colonies in a state of actual war cannot, by an intermediate capitulation, protect property which they have dispatched in their hostile character, and to the mother country still hostile. The property in that case was going to Holland. In this it was to have come first to the hands of these claimants, and would have been detained by them from passing into the hands of the enemy, on its ulterior destination. In that case the destination being to the enemy's country, was a trade which became illegal as soon as the owners assumed the character of British subjects, so that they could not claim either in their old or in their new character. In this case, the trade would have been divested of any illegal destination; if the property had got to the hands of the claimants, it cannot be contended it would not have been protected. It was, besides, another particular circumstance in *The Negotie en Zeevaart*, that at the time of adjudication, Demarara was again become a Dutch colony.

The *King's Advocate* in reply. There seems to be no reason to alter or limit the assertion, that all property in a captured colony is confiscable; that exceptions are to be carried no farther than the terms of the stipulation; and that all other property may be seized, when an opportunity of seizing it offers. No real distinction has been taken; the inhabitants of the Cape could not be considered as in alliance with this country in May, 1795; hostilities *de facto* had existed before that time, and the declaration was suspended only to give an opportunity to those who chose to leave Holland and its dependencies to withdraw; these persons remained in the [ \* 111 ] country, and are therefore to \* be considered as enemies, if the capture had been made before the Cape capitulated; if it had been made September 14th, there could then have been no doubt but that the property would have been liable to confiscation. The authority of *The Negotie en Zeevaart* shows, that property not expressly included in capitulation is subject to confiscation.

JUDGMENT.

SIR W. SCOTT. I am of opinion that this is a decided case on the authority of the Supreme Court in *The Negotie en Zeevaart*.<sup>1</sup> I remember that case well, having been junior counsel in it, and having

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<sup>1</sup> [See *The Herstelder*, 1 C. Rob. 113, 114.]



attended much to it; as there was much difference of opinion respecting it in the court below.

It was a case of a ship sailing from Demarara to Middlebourg, in Holland, on the 30th of January, 1781, about six weeks after the declaration of hostilities against Holland. Demarara surrendered to the British forces on the 14th of March; and the capture was made on the 25th.

The terms of capitulation were very favorable: "The inhabitants were to take the oath of allegiance; to be permitted to export their own property, and to be treated in all respects like British subjects, till his majesty's pleasure could be known;" and although this was in the first instance only under the proclamation of the captor, still that being accepted, it took complete effect. These terms were afterwards confirmed by the king. There was, therefore, in that case as strong a promise of protection as could be; and recognized and confirmed by the supreme authority of the state. [\*112] Under these circumstances, the judge of the admiralty thought the claim so strong, that he actually restored; and it was not his opinion alone.

On appeal, however, the lords were of opinion, that property sailing after declaration of hostilities, but before a capitulation, and taken on the voyage, was not protected by the intermediate capitulation. It was not determined on any ground of illegal trade, nor on any surmise, that when the owners became British subjects, the trade in which the property was embarked, became, *ex post facto*, illegal; nor was it at all taken into consideration, that Demarara had again become a Dutch colony at the time of adjudication. It was declared to be adjudged on the same principles as if the cause had come on at the time of capture. It was not on any of these grounds, but simply on the ground of Dutch property, that condemnation passed in that case. I remember a *dictum* of a great law lord then present, Lord Camden, "that the ship sailed as a Dutch ship, and could not change her character *in transitu*." <sup>1</sup>

This decision of the Supreme Court must be binding on me, unless there are in the present case any distinctions that take it out of the law of that decision. The distinctions made, are, 1st, that the colony in this case was not hostile; and, 2dly, that the ship was not going into the hands of the enemy, but that she was coming first to the Cape into the hands of the owners, now become British subjects; and that they would have altered the ulterior destination to Holland.

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<sup>1</sup> [The *Herstelder*, 1 C. Rob. 114; The *Ann Green*, 1 Gall. 289; The *Francis*, 1 Gall. 449; 8 Cranch, 354, S. C.; The *Vrouw Margaretha*, 1 C. Rob. 336, 338; The *Atlas*, 3 C. Rob. 299.]

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The *Herstelder*. 1 C. Rob.

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On the first point, that Holland was not hostile, it is enough that hostilities have since followed, and with a retrospective operation [ \* 113 ] ration. The state of affairs was at that time at best but very doubtful; and all property taken during that doubtful state of things has been since condemned; but it is said, that although Holland has become hostile, the Cape has not. If it could be proved that the colony adhered to the old government, it might entitle them to be exempted from this hostile character; but that is not shown, and there is no reason to presume it. They surrendered as Dutch subjects; and, therefore, there is no pretence now to contend for a different character.

The other distinction is, that this property was coming to the hands of the owners, whilst in the *Demarara* case it was gone from them, and must have fallen into the possession of the mother country; but there is no decided proof that this ship was coming to the Cape; and if so, she is still to be considered as taken merely *in transitu* towards Holland, where the voyage was clearly to have ended; and in what character? As a Dutch ship, in a Dutch port. If the vessel had arrived at the Cape, I will not say, that coming actually into the hands of the capitulants, she might not have been protected as property in possession; but being taken before she arrived there, as Dutch property, I am bound down by the decision of the lords; and I think myself obliged to say, that her character could not be changed *in transitu*; and that she must be condemned as Dutch property.

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[ \* 114 ]      • THE *HERSTELDER*, De Koe, master.

July 17, 1799.

Hostilities against the Dutch, declared the 15th of September, 1795, and applied retrospectively to property taken during the doubtful state of things that preceded the declaration.<sup>1</sup> A surrender by capitulation, is not the voluntary withdrawing required by the proclamation to the Dutch.

THIS was a case of a nature similar to the *Danckebaar*, but differing materially in the dates of some parts of the transaction. It is reported out of the regular order, as it may serve to show more distinctly the principles which were applied to property in this very particular situa-

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<sup>1</sup> [See The *Danckebaar* *Africaan*, 1 C. Rob. 107.]

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The *Herstelder*. 1 C. Rob.

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tion. The cargo in this case was shipped in February, 1795; and was taken on a voyage to Holland on the 27th of August. The declaration of hostilities against Holland issued on the 15th of September, 1795, and the surrender of the Cape to the English forces was on the 16th of the same month.

The ship and several parts of the cargo were claimed 29th April, 1796, for sundry persons residing at the Cape, at that time, as British subjects.

For the captor, the *King's Advocate* submitted, that this case stood exactly on the same principle as *The Danckebaar Africaan*,<sup>1</sup> and *The Negotie en Zeevaart*, and must follow their fate.

For the claimant, *Laurence and Robinson*. For a second claimant, *Arnold* — contended, that this case was distinguished from the *Danckebaar* by these circumstances: that this vessel was taken previous to hostilities; that in fact there was only one day of hostility between the sailing and the adjudication, the 15th and 16th of September; but that the negotiation for the surrender had commenced on the 14th; and, therefore, in justice the inhabitants were entitled to their indemnity from the commencement of it. It was said also, that *The Negotie en Zeevaart* was in its principle in favor of this claim; for if there was any justice in the principle on which it was decided "that where a shipper changes from enemy to friend after sailing, the character of his vessel cannot be changed *in transitu*," there appeared to be no other reason why "it should not be applied [ \* 115 ] *é converso*, except that in common cases, where shippers change from friends to enemies, you cannot restore without throwing away property into the hands of an actual enemy. But this case being so peculiarly circumstanced as to obviate that objection, was formed to try the soundness of that principle as a maxim of law; for as the inhabitants of the colony were clearly friendly at the time of sailing, hostile only doubtfully and by construction at the time of capture, and actually subjects at the time of adjudication, restitution might safely pass, and should pass, on the very principle that the character cannot be changed *in transitu*. It was farther contended, that the character of the person was to be considered only at two points of time, at the time of seizure, and of adjudication; that if he was capable of restitution at these times, he was not to be disqualified by intervening circumstances; or if a change could operate to his disadvantage, the

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<sup>1</sup> *Supra*, p. 107. *Lords*, July 18, 1782.

return of things to their old state intervening also, ought to operate again to his advantage.

**JUDGMENT.**

SIR W. SCOTT. This question arises on property placed under very particular circumstances. It is property belonging to persons at the Cape of Good Hope, and seized before the commencement of hostilities. Hostilities afterwards ensued; and by capitulation the Cape and its inhabitants were taken under the protection of Great Britain. The question is, therefore, whether the parties are entitled to recover this property under the capitulation?

[ \* 116 ]    \* The general rule certainly is, that personal property follows the rights of the person; that if at the time of seizure he is entitled to restitution, and if at the time of adjudication he is in a capacity to claim, he must be entitled to restitution; but though this is the general rule, it may be liable to be altered by particular exceptions. Distinct characters may be affixed on particular parts of property, which may make them liable to be treated in a different manner, from the general property of the same person.

Two cases have been cited on this subject as conclusive precedents. The *Negotie en Zeevaart* was a case of no inconsiderable diversity of opinion. In that case the property was shipped subsequent to the declaration of hostilities; but the colony was entirely ignorant of it at the time of sailing. The ship was taken navigating under the Dutch character; but a capitulation had intervened, in which the colony was declared to be in all respects on the footing of British subjects. The lords determined, that the ship sailed as a Dutch ship, and could not be altered *in transitu*.<sup>1</sup> The *Danckebaar Africaan* was a ship that sailed before hostilities, but was not taken till after the surrender of the Cape, under a capitulation for the protection of property. In that case the ship sailed before hostilities, and if the state of Holland had been in a clear and decided character of amity towards Great Britain, I should have held, that the party would be entitled to restitution, and to the benefit of the principle — “that the national character cannot be altered *in transitu*.”

But it is to be remembered that this was not the state of [ \* 117 ] Holland at that time. Though we speak of the \* declaration of hostilities as issuing September the 15th, it must be kept in mind that the state of Holland was very ambiguous for several months. Subsequent events have retroactively determined, that the character of Holland during the whole of that doubtful state of af-

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<sup>1</sup> [See *The Danckebaar Africaan*, 1 C. Rob. 107, 111.]

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The *Herstelder*. 1 C. Rob.

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fairs, is to be considered as hostile ;<sup>1</sup> and that the property of Dutch subjects seized under it, is to be treated as hostile ; and although the declaration of hostilities has made this difference, that it gives the individual captors a right in the capture instead of the crown, that is a domestic regulation only, and makes no difference with respect to the admission of the claim of former owners.

In the present case the property sailed before hostilities, that is, before the declaration ; for I must always keep in mind that actual hostilities are not to be reckoned only from the date of the declaration ; but that the declaration has been applied with a retroactive force. This ship then, sailing before the declaration, but during the ambiguous state of affairs, is to be treated as all other Dutch property taken at that time ; I cannot distinguish either to its advantage or disadvantage.

It is only to be inquired then, whether the parties have brought themselves under the terms of the protection which was held out to them. The proclamation held out an invitation to all who would leave Holland, and withdraw themselves to Great Britain, or to any other neutral country, that they and their property should be protected. All who accepted these terms, were certainly entitled to a liberal construction of them ; and if a person in a distant colony had, without knowledge of the proclamation, acted on the principle of it, out of affection to the old government of his own country, or out of dislike to the present government of France, I should have held, that such a person would be entitled to the benefit of the proclamation, although he had acted under entire ignorance of it.

If that could be made out in this case, I should decree restitution ; but how does that fact stand ? A great force was sent from this country to try the inclinations of the Cape. The invitation was made in the name not only of Great Britain, but of the Stadtholder also ; but it was rejected. Military operations were then commenced ; and the matter terminated in a forcible surrender to the British arms. Nothing could be more different from an act of voluntary surrender. As to the distinction which has been made between the acts of the government and the private inclinations of individuals, it cannot be admitted, unless indeed it was supported by very strong proof ; and unless some very clear overt acts could be shown to prove such a difference of inclination. The disposition of individuals is to be considered as bound up in the acts of the government of their country. I will not say that such a principle can admit of no exception under any possible circum-

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<sup>1</sup> [See *The Boedes Lust*, 5 C. Rob. 233.]

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The Concordia. 1 C. Rob.

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stances ; but it is a principle not lightly to be departed from, that the inclinations of individuals are to be considered as bound by the acts of their government.

If I am right in considering the property in this case, in the same light as other Dutch property taken at that time, it must [ \* 119 ] follow the \* same course. I am aware, this is to act on a principle sufficiently strong ; but it is one that has been laid down by the superior court ; and, therefore, it is one that I am undoubtedly bound to obey, although I have no scruple to declare, that it is a principle which I am not disposed to carry a step farther than authority leads me.<sup>1</sup>

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THE CONCORDIA, Wise, master.

December 20, 1798.

**An alternative destination should be expressed in the ship's papers. Masters must not conceal any papers, least of all their instructions. Restitution.**

THIS was a case of a vessel laden with tar, pitch, and deals, and taken on a voyage from a Swedish port to Genoa, on the 30th of July, 1798.

The ship and cargo were claimed as the property of merchants in Sweden.

JUDGMENT.

SIR W. SCOTT. This ship was taken under Swedish colors, on a voyage, as it is stated, to Genoa. The master, in his despositions describes the ship to be the property of a Swedish subject. The cargo

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<sup>1</sup> August 2d, the court expressed great dissatisfaction at finding that this vessel had been described as lying at Plymouth, when as it appeared, she was taken on capture to a port of Norway, and lay there at the time of adjudication. The Registrar was directed to annul the decree ; the court declaring that it would not condemn a vessel lying in a neutral port. [The Henrick and Maria, 4 C. Rob. 43 ; and S. C. 6 C. Rob. 138 n. ; The Invincible, 2 Gall. 31, 36 ; Hudson v. Guestier, 4 Cranch, 293 ; The Sophie, 6 C. Rob. 138 ; La Purisima Concepcion, 6 C. Rob. 45 ; The Comet, 5 C. Rob. 285 ; The Constant Mary, 3 C. Rob. 97 note, and S. C. Carth. 423 ; The Kierlighett, 3 C. Rob. 96 ; Nostra Signora de los Angelos, 3 C. Rob. 287 ; Page v. Lenox, 15 Johns. 172. As to condemnations by an enemy's court sitting in a neutral country, see note to The Flad Oyen, 1 C. Rob. 135.]

consists of tar, pitch, deals, and other articles, the produce of Sweden, the property, according to the master's evidence, of a Swedish subject, and going to Genoa; the papers confirm this account both as to the property and the destination.

\* It follows, therefore, that unless the depositions or the [\* 120 ] papers can be effectually discredited, we must consider this ship and cargo as the property of neutrals, sending the produce of their own country to a neutral port; for Genoa was not at this time in a state of avowed hostility with this country. It is true that a voyage of this sort wears no very favorable complexion; as it is notorious that Genoa was at this time very friendly to France, obedient to French rulers, who had overturned the old government of the country, and created a new one more subservient to their designs. The docks of Genoa were employed in the repair of French ships of war, whilst their port was shut against English cruisers, and for this conduct hostilities were soon afterwards declared against that government.

This was the fact. At the same time, I must say, that in point of law, it could not be considered as an enemy's port. The question then is, whether the evidence in this case is so discredited as to oblige the court to condemn, or to require farther proof? The papers all point to Genoa; the master deposes to that destination, without mention of any other; but other papers have been introduced. The claimants have since brought in an affidavit of the master, introducing a letter from the owners to Mr. Cowie (a merchant of this town, and their agent here); and also the owner's letter of instruction to the master. These show that the master had an option to come to England. There was an alternative destination. So far I go along with the captors, that this ought to have been disclosed in the papers and \*depositions. Wherever there is an alternative [\* 121 ] destination, it ought to be stated at first; but at the same time I cannot say, that it was such a fraudulent act, or so vicious a suppression, as materially to affect the master's credit.

Another circumstance pointed out against the master is, that he withheld his instructions till the time of examination. This was certainly incorrect. It is a master's duty to produce all his papers; and least of all, to withhold his instructions, which are very important papers to be communicated for the interest of both parties — important both to the owner and the captor; but here also, as he speaks out on his examination, and as the paper contains nothing for fraudulent suppression, I cannot think this circumstance sufficient to vitiate his credit.

It is farther objected, that the papers are colorable, showing only a

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The Welvaart. 1 C. Rob.

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destination to Genoa, whilst the master had a power of coming to London. But the situation of public affairs is to be considered; it is to be recollected, that at this time the French professed to seize all vessels which bore an avowed English destination. This is a circumstance fit to be considered, and one that takes off from the force of this objection. The letter of advice to Mr. Cowie confirms this part of the case, and goes far to prove that the facts were as the master has represented them; "that he had the liberty of going to England under particular circumstances," although his destination was to Genoa. If, then, I am satisfied that the facts of the case are as the master represents them, I must take the whole of his evidence together. Notwithstanding a suspicion which has been thrown out, that he might have the same instructions to go to France, I must believe what he says, directly denying that suggestion.

[ \* 122 ] \* If there is nothing to affect the case from these facts, what is there in the other objection, that he was sailing under convoy? The ship was taken alone, and as far as it appears, wholly unconnected with any other. The master swears, "he received express orders not to put himself under convoy; that he fell in with them accidentally; kept company with them a short time, but parted, and had not seen them several days." I am of opinion then, that this ship and cargo are not subject to any considerations which may apply to the case of convoy. This case stands on its own grounds; the voyage to Genoa may be unfavorable, but I cannot say it is hostile.

As the case of a Swede carrying the produce of his own country, and the property of subjects of his own country, to a port not hostile, I must restore.

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THE WELVAART, Cornelis, master.

January, 8, 1799.

The purchase of vessels in the enemy's country is allowed by England, but a bill of sale must be produced; circumstances leading to condemnation.<sup>1</sup> [Further proof refused where there was fraud.<sup>2</sup>]

THIS was a case of a ship, taken the 15th of February, 1798, on a

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<sup>1</sup> [See note to The Bernon, 1 C. Rob. 102.]

<sup>2</sup> [The Juffrow Anna, 1 C. Rob. 125; The Sally, 1 Gall. 408; The Liverpool Packet, 1 Gall. 513, 518; The Alexander, 1 Gall. 532; The Betsy, 2 Gall. 377;



voyage, ostensibly from Bourdeaux to Embden, but in reality to another French port; having been (as asserted) purchased in the enemy's country.

#### JUDGMENT.

**SIR W. SCOTT.** This is the case of a ship said to have been purchased in France, on behalf of two persons of Embden; one residing there, and the other a mariner attending on the ship.

The fact of a purchase in the enemy's country is alone almost a cause for farther proof; for, considering the situation of the enemy's trade, the court can hardly be satisfied of the fairness of such a transaction, unless the whole of it is shown. The commerce and coasting trade of France, \*it is well known, are totally [ \*123 ] intercepted; and the French are exerting every means to regain the use of their vessels, under the cover of neutral names. In such a situation of affairs, it must be under very special circumstances that a bill of sale would be deemed sufficient proof; but there is no bill of sale; which alone, according to the constant habits of this court, founds a demand for farther proof. Then what are the documents, and how are they supported? There is a formal pass from the magistrates of Embden; and there is a certificate stating, "that one of the proprietors appeared before them, and exhibited proof of his property by legal deeds."

The court is certainly bound by the law of nations to pay attention to public instruments; but at the same time it cannot overlook an impression made on it by various cases, in which it has appeared, that the magistrates of Embden have been victims of deception, during the war, to a very extraordinary degree. They certify also, "that the master is an inhabitant of Embden," and we have seen them certifying this in cases, where the persons appear never to have been there. There must, therefore, be a difference of opinion between us, respecting the effect of legal instruments, and perhaps these legal deeds are such as, if produced here, would not be allowed to have the same effect.

Again, it is an extraordinary circumstance that the master, though a part owner, should not have seen a bill of sale; and that he should not be able to give a more accurate account of the price, than that it was \*between eleven and twelve thousand [ \*124 ] livres. These circumstances deduct very much from his title of ownership.

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*The Fortuna*, 3 Wheat. 236; *The St. Lawrence*, 8 Cranch, 434; *The Jemmy*, 4 C. Rob. 31; *The Vigilantia*, 6 C. Rob. 122. See note to the *Eenrom*, 2 C. Rob. 1, 15, for other decisions as to admitting further proof.

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The Welvaart. 1 C. Rob.

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It is a case in which we should require farther proof in a strict degree, if it stood on the footing of property only; but farther proof is the privilege of honest ignorance, or honest negligence, to neutrals who have not violated the law of neutrality. It is permitted to neutrals by this country to purchase ships in the enemy's country, a liberty which France has always denied.<sup>1</sup> We certainly do allow it, but only to persons conducting themselves in a fair neutral manner, and not accessory to the purposes of the enemy; besides, this vessel appears to have been engaged in the coasting trade of France. The court has never gone so far as to say, that pursuing one voyage of that kind would be sufficient to fix a hostile character; but, in my opinion, a habit of such trading would. Such a voyage must, however, raise a strong degree of suspicion against a neutral claim; and the plunging at once into a trade so highly dangerous, creates a presumption that there is an enemy proprietor, lurking behind the cover of a neutral name.

There are other circumstances in this case perfectly inconsistent with the good faith of a true neutral conduct. The bills of lading purport a false destination, and give a representation of property which is also false; they describe the cargo as "to be delivered to Noemes," one of the claimants, and "as being the property of the master;" they are signed by him; he imposes on his own magistrates, and obtains a certificate from the Prussian consul as to his property; yet great merit is claimed for him, from the confession \* of the real destination at the time of capture; but it appears they were so near St. Maloes, that it was in vain to deny it.

Such are the facts of the case. Now there can be no principle more general, nor more solid than that one partner shall be affected by the fraud of another. In this case the conduct of the vessel was intrusted to the master, and he is also a partner; he engaged in covering the property of the enemy from capture. Shall such a man be indulged with farther proof; loaded as he is with false papers?

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<sup>1</sup> Toute navire qui sera de fabrique ennemie, ou qui aurait eu un propriétaire ennemi ne peut être censé neutre, ni allié, s'il n'est trouvé à bord quelques pièces authentiques. Non seulement que la vente ou cession en a été faite à quelqu'un des sujets des États neutres ou neutres avant la déclaration de guerre — with an exception of prize from the enemy. Ordl. 1744 and 1778. This law has been retained, with as many regulations of the old French code as did not interfere with the rapacious policy which directed all their proceedings, in matters of prize, during the present war. Les décrets concernant les prises continueront d'être exécutées, jusqu'à ce qu'il soit autrement ordonné. L. du 14 Feb., 1793; again, 2d March, 1797. *See also* 1790, vol. 2, p. 280.

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The *Juffrouw Anna*. 1 C. Rob.

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It is an unreasonable demand. I can have no hesitation; it would be contrary to every principle of rational justice if I allowed it.  
 Condemned.

THE *JUFFROUW ANNA*, Greeson, master.

January, 10, 1799.

Where farther proof is necessary by the practice of the court; it will not be allowed to persons convicted of fraudulent conduct, or departing from a fair neutral character.<sup>1</sup>

THIS was a case of a ship, taken 27th February, 1798, on a voyage from Nantes to Ostend; and appearing to have been purchased in the enemy's country.

JUDGMENT.

SIR W. SCOTT. This is a ship, which appears by the depositions of the master to have been an English prize, purchased in France.

There is no bill of sale on board; whoever the neutral claimant is, he must be subject therefore to farther proof. A claim has been given for Mr. Escherausen of Embden, but not till eight months had elapsed, which is an extraordinary circumstance, as he could not be so long ignorant of the capture; and although the court cannot say the claimant is out of time, it has some right [\* 126] to inquire how it happens that there has been such neglect of ordinary diligence.

Mr. Escherausen claims simply for himself; but the pass, which is the only paper translated, describes the vessel to be the property of two persons. If that was the case, the claim should have been specific. It is besides observable, that it undertakes to describe the voyage, but runs only in this vague form, from — to —. This is an omission, which I hope I shall not see again; as the destination is a very material circumstance to be known.

These are unfavorable circumstances; but independent of these, it would be a case for farther proof, as the papers are false. The master says, "he took possession of the ship at Dunkirk;" the master's residence was at Ostend; and all the crew were hired at Ostend; she sails to Nantz, and there takes in the cargo, which was on board at the time of capture; now what was the destination? It is repre-

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<sup>1</sup> [See note to The *Welvaart*, 1 C. Rob. 122, 124.]

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The Juffrouw Elbrecht. 1 C. Rob.

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sented by the master to have been alternative, and to have been left to his discretion, to go either to Ostend or Hamburg; but the papers represent Hamburg as the sole destination. To make a voyage fairly alternative, it should appear on the papers to be so; for otherwise it must mislead the cruisers of the belligerent countries, and prevent them from forming a right judgment of their case. The orders were, it appears, "to go to Ostend, if not obstructed by British cruisers."

The master was to use his best endeavor to get to Ostend, and only to take another destination if he should be prevented from accomplishing the first. This is scarcely to be considered [ \* 127 ] as an alternative \*destination; and besides, all the papers point to Hamburg only. I think, therefore, there is in all these circumstances a *mala fides* in this case; and if so, the rule which I have laid down must apply to it; the party cannot be allowed to go into farther proof. It is scarcely possible that it should have been a fair transaction; a suspension of the claim for eight months, the false representation of the claimant, the direct employment of the vessel in the enemy's trade, and false papers, convince me it must be a fraudulent case; and, therefore, I feel no hesitation to condemn.

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THE JUFFROUW ELBRECHT, Meintes, master.

January 10, 1799.

Circumstances leading to condemnation.<sup>1</sup>

THIS was a case of a ship, taken 23d of March, 1798, on a voyage from Rotterdam to Rouen.

JUDGMENT.

SIR W. SCOTT. This ship is claimed for Mr. Ruyl of Embden, who is not a *novus hospes* in this court. He has appeared in former cases; and, if I recollect right, in the *Ionge Helena*, in which he swore the ship was his property, when it was proved in evidence that she continued the property of the former Dutch owner.

The effect of this experience on our parts will be, not to shut the door against him, because every case is to be examined principally

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<sup>1</sup> [See note to *The Endraught*, 1 C. Rob. 22.]

by its own evidence; but at the same time it would be wrong to set up technical rules against the rules of common justice and reason; and to consider him as a person whose claims in this court do not require an investigation peculiarly strict.

\* Amongst the documentary evidence, there is a paper [ \* 128 ] said to have been obtained on the oath of Ruyl; but the master to the 27th interrogatory says, "it was obtained on his oath." This contradiction is not explained. Embden papers are but too open to the observation, that they have been in many cases obtained by fraud; and it cannot escape me that these papers were obtained by a person who has appeared to have obtained others falsely in other cases. The question is then, whether Ruyl can be considered as a *bonâ fide* proprietor of this vessel? The pass is granted on his oath; and it is on that also, on that alone, that the master founds his belief, or pretends to verify the property.

But will the *res gesta* sustain this account? The vessel is said to have passed into the possession of a Dane six months before the war; but it is to be remembered, that at that time the prospect of a war with Holland was certain. If we look to the employment, she appears to have been engaged three years invariably in Dutch trade; whether that alone would produce condemnation is an important question, which I am not at present called upon to decide. It is said, that would not be sufficient to fix a hostile character on the ship; but the question does not arise, as this circumstance is used, only to show the great improbability of the asserted title.

The whole concerns respecting this vessel have remained in Dutch hands; the master corresponded with Dutch merchants; and not at all with the asserted owner, Ruyl. He received all his money from them; his wife and family are resident in Holland; and his own occupation has been constantly \* in Dutch trade; [ \* 129 ] nothing has happened to change in any degree his national character, but the burgher's brief obtained for him by Ruyl; for he does not pretend to have removed either himself or family from Holland.

There is, besides, another circumstance which tends strongly to show that Ruyl is not the owner. The master does not profess to be acquainted with that part of the cargo which is claimed for him; stronger demonstration could not be given, that he had no connection with Ruyl, but looked only to his Dutch correspondents as his employers.

What is there then from which the court can infer this to be a genuine transaction, or any thing more than the superficial, shadowy business, of covering the property of the enemy?—a transaction of which the court has seen so many instances; and some in which this

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The Hoop. 1 C. Rob.

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very claimant has been concerned. Mr. Ruyl's claim, on the whole, is not supported by any evidence that can obtain credit from the court, and, therefore, I reject the claim.

Condemned.

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THE HOOP, De Vries, master.

January 10, 1799.

A case of farther proof.

THIS was a case of a ship, taken the 13th of April, 1798, on a voyage from Harlingen to Embden.

JUDGMENT.

SIR W. SCOTT. The ship is claimed for a person of the name of Uven, of Norden, by the master, who, on his depositions, knows nothing of his employer. It is, therefore, to be considered as a claim given in a general way, in discharge of his duty as master.

[ \* 130 ] \* The account which he gives of his appointment is very extraordinary. He says, "that he received at Pinneburg a parcel, with some keys, and directions to go to Harlingen in Dutch Friesland, and take possession of this ship; he went accordingly, and found her locked up, and no person on board." There the business begins and ends. He does not say that he has since received any letters from his owner; or that he has any knowledge of him. To be sure no man can be in more complete ignorance of another than he is.

Then how is the proof of property made out? There are some ship's papers; the first which we usually look for, is the pass, but that is granted not to the present claimant, but to other names. It is, therefore, absolutely impossible to restore on this evidence; it cannot be. It is, however, suggested, that Uven may be a member of a house of trade; or that there may have been a subsequent transfer; if so, it was their duty to obtain another pass. A general pass is a thing not to be admitted; and it is not to be said, that it is immaterial whether it be granted to A or B, if the real interest is neutral. A pass should describe, explicitly, one of the partners of a house of trade at least.

Possession appears to have been taken at Harlingen, from which a presumption arises, that the ship was Dutch property; the destination

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The Two Brothers. 1 C. Rob.

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also is unfavorable; the mariners' contract binds them to return to Holland. The depositions state Embden. But the ship was taken far out of that course; and the excuse is, that she was driven out by contrary winds. This is \*very equivocal. [\*131] But there happens to be a prior pass on board, describing her as a Norden ship; this is slight evidence to show that she belongs to that port. In consideration of this favorable circumstance, however, slight as it is, I shall allow this case to go to farther proof; but I shall expect strong proof; and a full explanation of all these strange appearances, accounting for the mode of taking possession, and for the informalities of the pass.

Farther proof ordered.

April the 30th. This ship was condemned, no farther proof being produced.

January the 8th, 1800. The claim of the master, for the cargo came on to be heard on further proof, and was condemned.



## THE TWO BROTHERS, M'Clousky, master.

January 11, 1799.

Suppression of papers is not a cause of condemnation in England; but it raises great suspicion. — parties will not be allowed to say that they were only private papers.<sup>1</sup>  
Circumstances leading to condemnation.<sup>2</sup>

This was a case of a ship, taken the 21st of May, 1798, on a voyage from Bourdeaux to Hamburgh; having been, (as asserted), purchased in the enemy's country.

## JUDGMENT.

SIR W. SCOTT. This is a ship said to have been purchased in France, by Walter Seaman, an American, in December, 1795; since

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<sup>1</sup> [See *Rising Sun*, 2 C. Rob. 104; *The Hunter*, 1 Dod. 480; *The St. Lawrence*, 8 Cranch, 434; *The Hendrick & Alida*, Hay & Marriott, 106; *The Maria Magdalena*, ib. 247; 1 Duer on Ins. 734 to 740; *The Calypso*, 2 C. Rob. 158; *Phoenix Ins. Co. v. Pratt*, 2 Binney, 308.

<sup>2</sup> [See note to *The Endraught*, 1 C. Rob. 22.]

that time she has been uniformly employed in French commerce; she has never gone into a neutral harbor, much less to any port of her new country.

Seaman was at the time resident in France, a circumstance which, the court has had frequent occasion to remark, strongly increases the suspicion, as the detection necessarily becomes more difficult; the continuance of the former trade raises a strong presumption [\*132] of a continuance of the former interest. These are \* general circumstances extremely suspicious, which it was proper to notice before I descend to the particulars of this transaction.

Of the documentary evidence, the only paper relied on, is the bill of sale; but that is entirely unauthenticated. Payment was to be made by bills of exchange, which are not proved to have been ever paid; and considering the length of time, there is great reason to suspect it was only a paper contract.

The pass was obtained according to the master's deposition, "on his oath;" but the instrument itself is not in unison with this account; for it purports to have been granted on the personal appearance and oath of Seaman.

Who is Mr. Seaman? He is said to be an American, who has obtained restitution from this court in other cases. If he appeared in those cases in a pure American character, he was certainly entitled to it; but it does not therefore follow, that the national character which entitled him to restitution in one transaction, entitles him to it in all. A man may have different national characters, according to the course of different transactions; and it is my business to examine the present claim by its own particular circumstances.

The master states in his depositions, "that Seaman is an American, but he does not know where he resides." We might have expected that there would have been some correspondence between them, if there had been any real connection; but it is not so; and no master can be less connected with his owner than this man seems to have been. On this view, I should find no great difficulty [\*133] in declaring \* what would be the legal effect of such a transaction, if the case required it. If a man goes into a belligerent country, and remains there four years, employing himself and his property in French trade, it will not be easy to take him out of the description of a merchant of that country, as to his property so employed.

But the ground on which I shall determine this case is that the *res gesta* does not convince me that Seaman had any interest in this vessel; for if he had, it is impossible that he should have turned his back upon her in the way he did, and that he should have left her in



the possession of this man, with such an absolute estrangement between them; it is so contrary to the common manner of acting towards property, that I cannot think it deserving of any credit.

So much for the papers. Then what is the subsidiary evidence? The master "believes Seaman to be the owner, because he told him so." This is a very slight ground of belief, to prove the validity of such a sale. There is no mention of directions, nor of accounts, nor of any thing confidential passing between them; besides, the master is entitled to less credit, from a circumstance which came out on the examination, "that he burnt some letters before capture."

These, it is said, were only the private letters of some women. Now no rule can be better known, than that neutral masters are not at liberty to destroy papers; or, if they do, that they will not be admitted to explain away such a suppression by saying, "they were only private letters."

\* In all cases it must be considered as a proof of *mala* [\*134] *fides*, and where that appears, it is an universal rule to presume the worst against those who are convicted of it. It will always be supposed that such letters relate to the ship or cargo, and that it was of material consequence to some interests, that they should be destroyed.

Besides, the fact does not come out, on the master's deposition, with great frankness. It is added, by interlineations afterwards, when this circumstance had been disclosed by another witness, whose credit has been attacked; but I think the master's confession of this fact, made in this manner, confirms the credit of the witness who mentions it; and if it were necessary to choose between the two, I should not hesitate to prefer the testimony of that witness. The mate also suppresses the circumstance; and as it is one which he could not but know, it is a suppression which very much impeaches his credit also. Looking to all these circumstances, to the want of proof of purchase, and to the mode of payment; seeing that the master is in a great measure discredited, from the whole complexion of this case, I am of opinion, that the asserted transfer never took place; and therefore I reject this claim.

[\*135]      • THE FLAD OYEN, Martenson, master.

January 16, 1799.

An English prize ship taken to Bergen, condemned there by the French consul, and sold, is not deemed to have been legally condemned, in a neutral country.<sup>1</sup>  
The ship restored to the former owner on salvage.

THIS was a case of an English prize ship carried into a neutral country, and there sold, under a sentence of condemnation by the French consul, and taken, the 12th of January, 1798, on a voyage from Bergen to St. Martins.

The claim was given on behalf of the purchaser, a Danish merchant.

The *King's Advocate* having opened the general circumstances of the case,

The COURT said, "This is a case in which I must call on the counsel for the claimant to begin."

*Arnold and Sewell.* The title to this vessel can scarcely be called in question on any doubts respecting the property, or the actual transfer. There are all the usual proofs of property on board, and the transfer is described to have been made in the most open manner, by public auction. The only ground on which it can be disputed, therefore, must be on the legality of such a sale; and, for that purpose, it is contended that a sentence of condemnation is essential to the transfer of prize ships, and that a legal condemnation did not pass on this occasion. But it nowhere appears what are the forms and circumstances necessary to make this a legal act. A condemnation took place, and under the person delegated by the French nation to exercise this function. There is no reason to contend that the name and process of an Admiralty Court are necessary, as long as the pro-

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<sup>1</sup> [*Havelock v. Rockwood*, 8 T. R. 268; *Donalson v. Thompson*, 1 Camp. 429; *The Kierlighett*, 3 C. Rob. 96; *The Falcon*, 6 C. Rob. 194; 1 Kent's Comm. 103, 104; *The Invincible*, 2 Gall. 28, 36, and s. c. 1 Wheat. 238; *Maissonnaire v. Keating*, 2 Gall. 324, 334; *Findlay v. The William*, 1 Pet. Ad. R. 12; *Wheelwright v. Depeyster*, 1 Johns. 471; *Page v. Lenox*, 15 Johns. 172; *The Perseverance*, 2 C. Rob. 239; *The Henrick & Maria*, 4 C. Rob. 43.

But otherwise, where the condemnation is in the port of an ally. *The Christopher*, 2 C. Rob. 209.]

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The Flad Oyen. 1 C. Rob.

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ceedings are held under the public authority of the belligerent country, and are conformable \*to the law of nations. [\*136] In the present war, 23d of November, 1795, there was the case of *The Madison*, a ship condemned under a sentence of the Bureau de Commerce at Bordeaux, in which the condemnation was held good. April, 12th, 1796, there was the case of a ship condemned by the representative of the French nation, as commissary, attending the French armies in their irruption into Holland. In point of form, it cannot be said the present instrument is defective; it asserts the nature of the authority under which it passed—the decree of the French nation—and then details fully the usual and regular proceedings. There seems to be no reason why it may not take effect in a neutral country, provided it be done with the permission of that government. In this instance the condemnation was in the most public manner; the sale was in the chancery of the country, and a Danish pass was immediately granted as for a Danish vessel. It is enough if the captor carries his prize into a place of security; and a neutral port has been expressly held to be sufficient for this very purpose, in books of great authority. Cons. del Mare, 287; Vattel, b. iii. c. 7, sec. 132.

The practice of our own country, also, has in many instances proceeded on this principle. English captors have taken their prizes into Lisbon and Leghorn, and condemnations have passed upon them lying there. In the last war, they carried them to Nice; and there was an instance of a ship, *The Favorite*, carried into this very port of Bergen, and condemned. On \*these [\*137] grounds, it is submitted, this practice cannot be impeached as illegal, and the claim to the property in question, transferred under it, must therefore be admitted.

#### JUDGMENT.

SIR W. SCOTT. This is the case of a ship taken by a French privateer, and carried into the port of Bergen, in Norway, where it appears she underwent a sort of process, which terminated in a sentence of condemnation, pronounced by the French consul, and under that sentence she is asserted to have been transferred to the present neutral proprietor.

The sale was conducted by public auction; but it appears that the very person who was the purchaser in that case, was likewise the actual seller, and stood in the capacity of general agent, at this place, for the French nation. The ship was put up to auction; there was no bidder whatever, and she was purchased by himself, under the denomination of agent.

Now, from the ambiguity of these expressions, the presumption on the face of such a sale would be, that he purchased her in the same character in which he sold; having sold as agent for the French, he might be considered as having bought also for the French proprietors, who carried her into that port. The utmost that the court could do in such a case, would be to allow farther proof, in order to see in what character he made the purchase, whether *proprio nomine*, or as agent.

It appears that this ship was sent immediately to France, which of itself colors the nature of the purchase, and shows it could not be for a mere Dane, and for Danish commerce, but on behalf of [\*138] \*persons resident in France. It appears, likewise, that he sent this vessel, with papers, for the island of St. Martins, but in fact gave verbal directions to the master to get into the port of Havre if he possibly could. Now, from the depositions of the master, I think it was entirely within the knowledge of the pretended purchaser, that Havre was a blockaded port. He orders him "to get into Havre de Grace, and land the goods, if it be possible; but in case he should be prevented from so doing, he was then to go to St. Martins, and land the goods there." I think it sufficiently appears, under these circumstances, that the vigilance of British cruisers was, if possible, to be avoided; and that there has been a fraudulent intention to break the blockade, which at that time was actually existing.

All the papers on board differ from the actual proof, because they represent St. Martins as the primary port of destination, whilst it was in fact to be the dernier resort only, in case he could not effect his attempt to get into Havre. Under these circumstances, I am of opinion that this does amount to that fraudulent conduct on the part of the purchaser, which would debar him from the advantage of farther proof; and taking all the circumstances together, I am of opinion that it was no actual transfer, but that the ship remained the property of the French captors, and was going to France to be put into their possession; and therefore upon that part of the case I should have very little doubt in pronouncing a sentence of condemnation.

[\*139] \* But another question has arisen in this case, upon which a great deal of argument has been employed, namely: Whether the sentence of condemnation which was pronounced by the French consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bonâ fide* made? I directed the counsel for the claimants to begin, because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary;<sup>1</sup> and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia*; the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize, \* it should appear also that she has been, in a pro- [\* 140 ] per judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that, in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country; in my opinion, if it could be shown, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough; more must be proved; it must be shown that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation; it is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a farther progress. Thus, for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other, modes of destruction; and a belligerent is bound

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<sup>1</sup> [1 Kent, Comm. 103; The Santa Cruz, 1 C. Rob. 50; La Nereyda, 8 Wheat. 100; The Ceylon, 1 Dod. 119.]

to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the [\* 141] same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.<sup>1</sup>

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient and universal practice of mankind, and say that as far as that practice has gone, I am willing to go, and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice,<sup>2</sup> from the

<sup>1</sup> [See 1 Kent Comm. 2, 3.]

<sup>2</sup> Respecting the ancient practice, a long train of authorities are to be found in the maritime codes of the several States of Europe, and in a variety of ancient and modern treaties. The French Ord. of 1400, requires "that in all prizes made, leurs prisonniers en seront amenés ou apportez à terre devers nostre admiral." Ord. 1543, that all captors, "amènent les personnes, navires, vaisseaux, marchandises, et autres biens qu'ils prendront à leur voyage, au même port et havre, dont ils seront partis, pour faire le dit voyage." In the reign of queen Elizabeth, proclamations issued on this subject in England, forbidding English captors to proceed to sale of prize-goods any where but in England, or before condemnation. Rym. Fæd. v. 16, p. 438. See also, 2 H. 5, c. 6. In 1655, there was an act of the States General of Holland, forbidding the Dutch consuls in Cadiz and other countries, to facilitate the sale of prizes carried into places under their district, "much less shall they, by their approbation, give the said captains any right or color of right for the condemnation of the said prizes, but shall leave and reserve the same to the said College of Admiralty." Thurl. State Papers, v. 4, p. 194. In France the old practice was observed in Ord. 1674, and 1689, by which "il étoit défendu à tous capitaines ou commandans des vaisseaux de guerre, de laisser, ou d'envoyer en pays étranger, aucunes des prises qu'ils pourroient faire." And so the practice continued till the Ord. 11 March, 1705, "qui pour la première fois a permis de conduire les prises dans les ports étrangers, de les y vendre, ou de les ramener, sous la garde et la surveillance des consuls Français." Code des Prises, 1799, v. 1, p. 375. In 1759, Ord. 22 May, France seems to have returned to the old practice, "aucune prise ne sera conduite dans un port étranger, à moins d'une absolue nécessité." Code des Prises, 1784, p. 1221. The Ord. November 8, 1779, however, contains detailed instructions to the French consuls to take examinations, inventories of papers, &c. and send them to France for adjudication, and after receiving a sentence of condemnation, to superintend the sale of the prize-goods, still lying in the neutral port. Whether this practice of taking refuge with prizes in a neutral port,

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earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage of the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me, that it is the duty of this court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion. [\* 142] But even if we look farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained; proceedings upon prize are proceedings *in rem*, and it is pre-

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and of selling them there after an adjudication in the court of the belligerent, will be held to be an admissible practice, in our Courts of Admiralty, is reserved for judgment in the case of *The Henrick and Maria, Baar*.

The first decree that passed in France during the present war on this subject, was of 18 September, 1793, which directed the minister to negotiate with the Danish government, "et d'obtenir de lui conformement au droit de gens, la faculté de faire vendre dans ses états, les prises qui ont été, ou qui seraient conduites dans ses ports, &c." Consular condemnations are not mentioned, but they were soon resorted to, for the law, 17 March, 1798, ratifies all the decisions on prize matters that had passed before the French consuls in neutral ports previous to the 27 May, 1796, &c. The editor of the new code des Prises candidly reprobates both the practices, as repugnant to the ancient principles of the law of nations, and as inconsistent with the situation and character of neutral ports. Code des Prises of 1799, v. 2, p. 151, et seq.

By the Danish Ord. 5 April, 1710, it was forbidden to cruisers of that country, under pain of death, to carry their prizes into any other than Danish ports. In a variety of ancient treaties, so early as the fifteenth century, it is expressly stipulated, that prize goods taken from one party, at war, and brought into the ports of the other, being neutral, shall not be permitted to be sold, but shall be restored, and that the cruiser of an enemy shall not use their ports for the purpose of annoying the trade of either of the contracting parties. Rymer Fœd. v. 9, p. 117, *et passim*, in the reigns of H. 3, H. 6, Edw. 4, H. 7. Also in a variety of later treaties, *præsertim* England and France, 1786, art. 40. England and America, 1794, art. 19. A just distinction seems to be, that it is not competent to a neutral state to restore prize goods, or intermeddle with captors, merely putting into their ports for provisions, &c. See *supra*, p. 66. But that cruisers should not increase their force there, nor be allowed to make any use of neutral ports, that must directly affect the chance of war between the belligerent powers.

It has appeared in the papers of the *Betty*,<sup>1</sup> Cathcart, that America has acted on this distinction, and that in 1795, the Admiralty Court of South Carolina, entertained suit on a British prize ship brought in there, and decreed restitution to the British claimant, on proof that the French privateer had augmented her force in an American port.

<sup>1</sup> *Infra*, p. 220.

sumed, that the body and substance of the thing, is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem*, being cases of condemnations of British prizes carried into the ports of Lisbon and Leghorn; but in those the condemnations were pronounced by the High Court of Admiralty in England. The only cases are of two ships carried into foreign ports, and condemned in England by this court; the very infrequency of such a practice shows the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to Lisbon and Leghorn, it has been said, that if the courts of Great Britain venture this degree of irregularity, other countries have a right to go farther. That consequence I deny. The true mode of correcting the irregular practice of a nation, is, by protesting against it, and by inducing that country to reform it. It is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume as much as it thinks fit.

Upon these ports of Lisbon and Leghorn it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to British ports. The British [\* 143] exist there in a distinct character, under the protection of peculiar treaties; and with respect to Portugal, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally. To be sure no covenant can have more the effect of giving the ports of England and Portugal a reciprocal relation of a very peculiar sort—to make the British ports Portuguese ports, and the Portuguese ports British ports to a certain degree. Now, unless I am given to understand, that peculiar treaties between France and Denmark have impressed such a distinctive character upon the port of Bergen, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a French port, exactly in the same manner in which London may be considered as a Portuguese port, or Lisbon as a British port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt, for it by no means ap-



pears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But secondly, Supposing that no doubts could be entertained respecting the sufficiency of such sentences, \* it by [ \* 144 ] no means follows that the efficacy of the present sentence can be supported. There the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other states may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it; and least of all could such an authority be conceded in the matter of prize of war—a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory, and in which such a concession of authority cannot be made without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession. Observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the Admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn, who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility.

\* It gives one belligerent the unfair advantage of a new [ \* 145 ] station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American government defeat a similar attempt made on them, at an earlier period of the war. They knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.

Whether the government of Denmark has shown equal vigilance in observing, or equal indignation in repelling the attempt, is more

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The Henrick and Maria. 1 C. Rob.

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than I am warranted to assert. But though the publicity of the transaction in the town of Bergen, may subject the police of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself. I must, therefore, deem the act of this French consul a licentious attempt to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorized.

[ \* 146 ] \* I am of opinion upon the whole, that this ship must be restored to the British owners upon the usual salvage; and I dismiss the claim of Mr. Krohn upon both grounds, as well upon the legality of the sentence, as upon the want of reality in the pretended transfer from the French captors. And I must add, that Mr. Krohn appearing to possess two characters, that of Danish subject and of French agent, the claim which he has brought forward, savors much more of the latter character than of the former. It is beyond my belief, that any man standing in the genuine and unmixed character of a Danish subject, should entertain a wish to establish that sort of law for which this French agent has thought proper to contend.

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THE HENRICK AND MARIA, Baar, master.

January 15, 1799.

Notification of a blockade is an act of high sovereignty, and not to be extended by those employed to carry it into execution.

Notice of a general blockade of the coast of Holland, untrue in fact, is not available by limitation to a blockade of Amsterdam only, though really existing.

[A persistence in a voyage after notice of blockade, a ground of condemnation.]

THIS was a case of a Danish vessel, taken on a voyage from Norway to Amsterdam, June 28th, 1798.

For the captor, the *King's Advocate* contended, that the ship was liable to confiscation for breaking the blockade, as the master, on being warned not to go to any Dutch port, declared "he must proceed according to his bills of lading."

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The *Henrick* and *Maria*. 1 C. Rob.

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For the claimant, *Laurence* argued, that the notice of a blockade of all Dutch ports, was at that time not \* true, and [\* 147] therefore it could not be made good by limitation or construction for Amsterdam, the only Dutch port which was then under blockade.

JUDGMENT.

SIR W. SCOTT. There are two objections taken in this case: first, That the notice of the captor was illegal; and secondly, That the master did not in fact proceed towards Amsterdam.

Now, the notice appears to have been "not to proceed to any Dutch port." To be sure that goes a great deal beyond any thing which the captors had a right to prescribe; for they ought to have specified the ports to which the blockade was confined. The great point is, to understand what the master apprehended was the prohibition upon him; for certainly what is represented to have passed between him and the captor cannot be conclusive.

The master says, "he was captured on account of his destination to Amsterdam, and because he said he must proceed thither." This, it is contended, was merely a hasty declaration of the master, not carried into effect. And if the master had taken upon himself to say, that upon this warning he did intend to change his course, but was seized immediately, it would be pressing the matter too hardly upon his owners, not to allow him time to express his determination. But he says no such thing; and if his conduct amounts to an obstinate perseverance to go there, I should hold that a blockade may be broken by obstinacy, as well as by fraud; and if a master says, he will go, and he must go there, in defiance of notice, his owners must take the consequences of his conduct.<sup>1</sup>

\* It is a circumstance in favor of this man, that the only [\* 148] ships in sight were two Danish merchantmen. The sight of one vessel would not certainly be sufficient notice of a blockade; and therefore it is necessary, that it should be signified to me, that there was a blockade, *de facto*, before that port.

The evidence is very imperfect on that point. I shall, therefore, require farther information, and give both parties an opportunity of producing what they think favorable to them.

May 10th. Farther proof was given of the notice which the master had received of the blockade of the *Vlie* passage.

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<sup>1</sup> [The *Shepherdess*, 5 C. Rob. 262; The *Apollo*, 5 C. Rob. 286.]

SIR W. SCOTT. On the former hearing it appeared that some notice had been given, but I wished to obtain more particular information respecting it. The notice was written on the ship's papers, to this effect: "This ship was boarded and warned not to proceed to any Dutch port." The master states, "that the ship was arrested, because he said he must proceed according to the bill of lading."

It was open to both parties to have given explanatory affidavits, but the captors have offered none. Therefore, unless it is shown that they have been prevented, by absence at sea, or other just cause, I must take the claimant's affidavit to be true. The notice is, I think, in point of authority, illegal. At the time when it was given, there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty, and a commander of a king's ship is not to extend it.<sup>1</sup>

[ \* 149 ] The notice is also, I think, as illegal in effect as in authority. It cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election, as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress. And I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation.

But that he did so, rests only on verbal answers and conversation. I adhere to what I said before, that an obstinate adherence to a first intention would subject a ship to the penalty, and the owners must bear the consequences of the obstinacy of their master. But I think the conversation of this man was not an expression of final intention; but that of a man deliberating under difficulties, in which he was unfairly placed. The captain of the king's ship asked the master, if he knew that Holland was blockaded, and he answered "that he did not." This question agrees with the written notice, and shows how strange a misapprehension the commander had entertained, of the nature of the blockade which he was employed to form.

The master said, "he could not answer it to his owners to go to any place but Holland." The commander does not point out to him any ports of Holland to which he might go, but tells him he might go to Bremen, Hamburgh, or England, and adds, "as you must go to Holland, you are my prize." I think the notice was erroneous, and besides not broken; and, therefore, I restore this ship.

[ \* 150 ] \*Application was made for the claimant's expenses, but

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<sup>1</sup> [ *The Juffrow Maria Schroeder*, 3 C. Rob. 154. ]

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The Vrouw Judith. 1 C. Rob.

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refused, there being other grounds of justifiable seizure independent of the question of blockade.

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On a subsequent day a farther question, was raised as to this ship, respecting the legality of a condemnation, passed in Holland; the papers being sent thither, but the ship still continuing in the Danish port, to which she was carried immediately on the capture.

Judgment reserved.<sup>1</sup>

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\* THE VROUW JUDITH, Volkerts, master. [° 150]

January 17, 1799.

Persons entering a place under blockade *de facto* only, are entitled to warning.

By egress a blockade may be broken without notice, as those within are presumed to be necessarily apprised of the fact.

THIS was a case of a vessel, taken coming out of Havre, August 21st, 1798.

For the captors, the *King's Advocate* contended that it fell under the law which had been laid down respecting a breach of blockade; that blockade<sup>2</sup> was broken by egress, as well as by ingress.

For the claimant, *Laurence* argued that it was necessary to show there had been a declaration of this blockade; or, if it was only a blockade *de facto*, that it was permanently existing; for the seizure was made by one vessel only, and it did not appear that the others were not at a great distance.

#### JUDGMENT.

SIR W. SCOTT. This is a ship that was taken sailing under Prussian colors. A claim has been given for a person of Embden, but the evidence of property is admitted not to be complete.

She appears to have been a prize vessel taken by the French; but after that, her history is no farther detailed, nor does it appear whether she had continued to navigate from French ports or not; all the

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<sup>1</sup> [See the decision in 4 C. Rob. 43.]

<sup>2</sup> Vide *supra*, The Frederick Molke, p. 86; The Betsy, Murphy, p. 93.

SIR W. SCOTT. C. had been given, but respecting it. The effect: "This ship Dutch port." The he said he must pass.

It was open to the but the captors had they have been must take the ship in point of authority was no blockade of blockade is a ship.

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blockade, I must observe, that vessel passing outwards as a place, by sentence is, as far as human cut off. It is intended to that place, and a neutral traffic of exportation than allowed to a neutral vessel cargo before the blockade with it. But it must be considered to apply, that a neutral ship bona fide, purchased and de blockade. If she afterwards act, and a violation of the

[\* 210, 234.]

2 C. Rob. 119; The Potsdam, Rose in Bloom, 1 Dod. 57; The Byfield, 1 Edw. 188; The Wheat. 183.]

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The Vrouw Judith. 1 C. Rob.

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It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner, by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice. But it may commence also *de facto*, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore be ignorant of the fact.<sup>1</sup> Vessels going in, are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But I take it to be quite otherwise with vessels coming out of the port which is the object of blockade; there no notice is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship.

\* In respect to this port, there had been a blockade notoriously existing during a great part of the summer. A person breaking it, is *primâ facie* a delinquent, and the court will hold it to be incumbent on those who are seized in this act, to prove the circumstances by which they hope to be exonerated from the delinquency imputed to them. Now, it being proved in this, and in other cases, that there was a blockade existing at the time of capture, what is there in this evidence to satisfy me that it was not existing, and notoriously existing, when the cargo was taken on board, and at the time when the vessel came out? The lading was taken in on the 10th of August, and the ship sailed on the 21st. Was there any reason to believe the blockading force had retired at that time? I find the ordinary force, which is never large, stationed round, at the time of capture. This vessel sallies out, and is immediately arrested. I think, then, there is proof of force sufficient to blockade this port, and evidence to satisfy me that it could not be unknown to the parties. I will farther add, that the case is, in other respects, of a very unfavorable appearance. There is strong reason to suppose, the cargo and the vessel are neither of them the property of the claimants.

There are many circumstances that prevent the indulgence of farther proof; and looking at the whole of this case together, I think myself warranted to reject these claims.

The claim being rejected, the ship was restored on salvage to the former British owner.

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<sup>1</sup> [The Neptunus, 1 C. Rob. 170, 171.]

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The Columbia. 1 C. Rob.

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had been given by the owners; and these orders are found in a letter from Messrs. Vos and Graves, of New York, to Boué & Co., informing them that The Columbia was intended for Amsterdam, consigned to the house of Crommelin, to whom Boué & Co. are directed to send the vessel on "if the wind should continue unsteady, and keep the English cruisers off the Dutch coast;" if not, they were to unload the cargo, and forward it by the interior navigation to Amsterdam. Boué & Co. accordingly direct the master "to proceed to Amsterdam, if the winds should be such as to keep the English at a distance." There is also a letter from the master to Boué from Cruxhaven; in which he says, "Amsterdam is blockaded."

We have this fact then, that when the master sailed for Amsterdam, the blockade was perfectly well known both to him and the consignees; but their design was, to seize the opportunity of entering whilst the winds kept the blockading force at a distance.

\* Now, under these circumstances, I have no hesitation in [\* 156] saying that the blockade was broken. The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade; but the blockade is not therefore suspended. The contrary is laid down in all books of authority;<sup>1</sup> and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud.

But it has been said, that by the American treaty, there must be a previous warning. Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel appear to have been sufficiently informed of this blockade; and therefore, they are not in the situation which the treaty supposes.

It is said also, that the vessel had not arrived; that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion, that the sailing with an intention of evading the blockade of the Texel, was beginning to execute that intention; and is an overt act constituting the offence. From that moment the blockade is fraudulently invaded.<sup>2</sup> I am, therefore, on full conviction,

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<sup>1</sup> [The Frederick Molke, 1 C. Rob. 86; The Hoffnung, 6 C. Rob. 112, 117.]

<sup>2</sup> [The Vrow Johanna, 2 C. Rob. 109; Medeiros v. Hill, 8 Bingh. 231; Naylor v. Taylor, 9 B. & Cr 718; Yeaton v. Fry, 9 Cranch, 440. As to contingent destinations, see note to The Spes, 5 C. Rob. 76.]

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*Le Francha.* 1 C. Rob.

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of opinion, that a breach of blockade has been committed in this case ;  
that the act of the master will affect the owner to the extent  
[ \* 157 ] of the whole of his \* property concerned in the transaction.

The ship and cargo belong, in this case, to the same individuals, and therefore they must be both involved in the sentence of condemnation.

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LE FRANCHA.

January 22, 1799.

The Court of Admiralty will not pronounce whether head-money is due or not ; but only the number of men on board.<sup>1</sup> It does not pronounce that, when there is a cargo on board.

THE *King's Advocate* moved the court to pronounce, that head-money was due on the capture of this ship, being an armed and commissioned ship, although she had a cargo on board.

COURT. I conceive that the court, in no case whatever, directly pronounces head-money to be due ; it goes no further than to intimate its opinion, by declaring the number of persons who were on board at the time of the engagement. But the commissioners, who are to pay the head-money, where due, are not, that I know of, bound to pay at all upon the opinion so intimated ; though if they do pay, they are bound by the declaration of numbers made by the court. With respect to the circumstance of having a cargo on board, the court directed precedents to be looked up. The Registrar said, that on a former search, directed by the judge, such ships appeared to have been deemed not entitled.

October 22, 1799. This subject being moved again in the case of *The Ceres*, the King's Advocate prayed, that the King's Proctor might be directed to make a search also, as it was a question in which king's ships were much interested.

[ \* 158 ] \* The Registrar said, that he and the King's Proctor had searched together ; and that they had found the precedents were all one way, against pronouncing for head-money when a cargo was on board.

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<sup>1</sup> [See *La Bellone*, 2 Dod. 343.]

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*The Argo.* 1 C. Rob.

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**Court.** If my opinion had not been affected by these precedents, I cannot say that I should have taken such a distinction ; but as there are such precedents, the court will be guided by them.

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**THE ARGO, Smit, master.<sup>1</sup>**

January 22, 1799.

Letters of procuration are required to be exhibited in purchases made by agents in the belligerent country.

A discussion of proofs of property. Fraudulent appearances. Condemnation.

**THIS** was a case of a ship taken 12th of August, 1798, on a voyage from Nantz to New York, and claimed as the property of Mr. Abegg & Co., of Embden.

**JUDGMENT.**

**SIR W. SCOTT.** This is a prize ship, asserted to have been purchased in France, for Mr. Abegg & Co., whose transactions have appeared before this court in other cases, not much to their advantage ; and although it is not on considerations of this kind that I must determine the present case, I cannot entirely overlook the conduct of parties, as far as it has judicially pressed itself on my notice.

The bill of sale purports the vessel to have been an English prize, regularly condemned and purchased by agents in France, on behalf of Abegg & Co. ; but there is no letter of procuration exhibited ; and it is not sufficient for a person to go before a magistrate, and declare before him the commission under which he acts. It [ \* 159 ] must be shown to me by proper documents, that the asserted agent was legally authorized to make this purchase.

On this statement of the case, then, it is a case of farther proof ; as there is no procuration. And being so, it becomes necessary to look farther into it ; for unless the circumstances are such as to satisfy the court, at least in some degree, that it is a fair case, the parties will not be entitled to the privilege of farther proof.

The circumstances of a case may be such as to make it utterly incredible, although there are confident attestations in support of it ;

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<sup>1</sup> [Affirmed on appeal, May 6, 1802.]

the circumstances may be highly unnatural and irreconcilable with any view of a fair transaction. The court must undoubtedly be upon its guard against running wild upon mere general presumptions; but it must judge of the common transactions of life upon the same ordinary principles on which the probity and fairness of such matters is examined in the general practice of mankind.

The account given of this transaction is, that this ship being laid up unemployed, Mr. Abegg sent for this master, though personally unknown to him — a man by birth a Prussian; but who, being a single man, and without a residence, had no other national character than that of the service in which he was employed. He seeks out such a man as this to navigate his vessel for him; he brings him to Embden, procures for him a burgher's brief, and pays for his admission, although he was before utterly unknown to him. This is the commencement of the transaction; and, to be sure it [ \* 160 ] \* could not begin in a more unnatural manner.

But the sequel is of a piece with it; for that a merchant should confide in a perfect stranger, and trust him with a valuable cargo, in a trade perfectly new to him; that he should send for him to Embden; yet, during his stay there, hold no conversation with him respecting the future management of his vessel; that he should send him away without mentioning to him the name of any consignees, without any documents except a printed pass, and without any instructions, except to go to Peyrusset, at Nantz, who had been the former proprietor of this vessel; that Peyrusset should be the only person to supply him with money and directions; all these are circumstances of gross improbability; and when I look at the evidence by which they are to be supported, instead of being clear and satisfactory, it is irreconcilable to any supposition of a fair case.

The whole is loaded with difficulties which leave on my mind a conviction that the name of Abegg has been used in this case for purposes to which a neutral name ought not to be accommodated.

There are besides many other circumstances equally suspicious. When the ship is brought in, the master writes to Mr. Fridag, his asserted owner's correspondent in London, informing him, that the ship is taken; and she is immediately claimed. But no claim is given for the cargo till after a considerable time. It is said no mention was made of the cargo, as it is not usual to mention it, although it belongs to the owner of the ship. It may be so. But it seems to be the natural conduct on such an occasion, and, indeed, [ \* 161 ] \* the duty of the master, when both are equally in danger, to take care of one as well as of the other.

The master says, to the fourth interrogatory, "That Peyrusset

delivered possession of the vessel to him." To the seventh, "That the voyage was to end at New York;" although I am satisfied on many grounds, that he was to have returned again to France.

To the ninth, "He believes Abegg & Co., to be the owners, because Abegg and Peyrusset told him so." But he does not say, that Abegg ever exercised one act of ownership, except that of sending him to take possession.

To the thirteenth, he says, "He believes the cargo to be the property of Abegg, because he told him so." But yet he gave him no orders respecting it whilst he was at Embden; nor was it at that time on board, or purchased.

It is, besides, observable on the cargo, that it consists of British articles; and the only account given of that circumstance is, that being prize goods, not allowed to be consumed in France, neutrals had therefore an opportunity of purchasing them cheap. To the fifteenth, he says, "There was a charter-party signed between him and Peyrusset on one side, and three French brokers on the other." It is certainly not uncommon to see charter-parties, where the ship and cargo appear to belong to the same person; and for the purpose of ascertaining the separate accounts; but why three French brokers should intervene, cannot be so easily explained. It was, besides, not a little extraordinary, that these French brokers should stipulate with him to employ Mr. Schweighausen, as his con- [\* 162] signee; and that the master should agree to accept him, although he had never before heard of his name; more especially, as he was not in the list of Mr. Abegg's correspondents, and the master had received no instructions to that purpose from his owner.

It is observable also, that the cargo was going under three different marks; and the letter to the consignees directed them to ship the returned cargo under the same marks. This is much more consistent with the supposition of three several interests, for which the French brokers acted, than with this claim for it as the entire property of one man. Besides, as it has been observed, these distinctions could not be meant to serve as directions for the insurance, for that appears to have been done for one person only, as the sole proprietor.

To the twenty-fifth interrogatory the master says, "That he wrote to Abegg from Nantes, and received three letters from him, which he burnt before his departure." That this amounts to the same offence as a spoliation of papers after the commencement of the voyage, I will not say. But it is an extraordinary circumstance, that having not one scrap of paper from his owner, he should think these of no consequence. It is a conduct so unusual, that it leads strongly to a conviction, that the contents were such as would not bear the eye of

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The Vrouw Hermina. 1 C. Rob.

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an observer. Upon the whole, these are all circumstances so utterly inconsistent with any view of a fair case, that I am convinced the ship and cargo cannot be the property of this neutral claimant.

Every part of the evidence points strongly to French interest. I shall, therefore, \*condemn the ship and cargo, and direct the ship to be restored, on salvage, to the former British owner.

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THE VROUW HERMINA, Jonker, master.

January 27, 1799.

Further proof is not granted in cases appearing incapable of fair explanation.

A petition for a rehearing on account of the mistake of the agent was refused, the suggestion being insufficient.

THIS was a case of a ship, formerly a Dutch vessel, but asserted to have been transferred to a neutral merchant, taken September, 1798, on a voyage from Rotterdam to Lisbon.

JUDGMENT.

SIR W. SCOTT. This is a claim given for a ship as the property of a person of Weender in East Friesland. It is admitted on the part of the claimant to be a case loaded with considerable difficulties; and the prayer is only, that an opportunity may be given for explaining them by farther proof.

The question for me, therefore, to consider is, whether these difficulties are of such a nature, as to admit of a fair and satisfactory explanation? because, if they are not, if they are out of the reach of any rational solution, farther proof would be no benefit to the party praying it. It would be attended with much delay and expense to the captors, and I should therefore think it my duty to refuse it.

The ship was taken on the 17th of August, 1798. A claim was given for the cargo on the 4th of October; but no claim whatever was given for the ship till the 8th of December; not till four months after the capture. This delay is more extraordinary; because we find \*the master is himself a part owner of one third share. This is an extraordinary circumstance, and not like the natural conduct of a person holding a real interest. The vessel was brought into Portsmouth; but it is not till the 8th of December that any claim is given; and it is then given by Mr. Fridag, the Prussian consul, for Mr. Brackterende, as the sole proprietor. That

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The Vrouw Hermina. 1 C. Rob.

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again is an extraordinary circumstance; because there is no pretence to say, that this inaccuracy could have proceeded from hurry or want of time. It is not till after four months that a claim is given; and then not, as it ought undoubtedly to have been, representing all the joint interests, but stating Mr. Bracktezende to be the sole owner.

The vessel is Dutch built, manned by a Dutch crew, and commanded by a person who was by birth a Dutchman, and has almost always resided in Holland; although there is one paper on board, a certificate, which holds out the master to have been born at Weender. On his examination, however, he says he was born in Holland; and lived there till within the last eight years. The transaction is entirely Dutch. The course of employment of this vessel is constantly returning to Dutch ports. She never goes to Weender or Embden; but is as much a stranger to all Prussian ports as if she had no connection whatever with that country.

The papers purport a destination to Lisbon; but it is admitted now that she was going really to Guernsey; and this misrepresentation is said to have been necessary, in order to obtain a clearance under the practice, common to all countries, of refusing to permit neutral vessels to clear out for an enemy's port. \* This has [ \* 165 ] certainly appeared to be true in many cases; but that is not all in this case; for the master persisted in the same account when he was stopped. He withheld the papers which show his real destination; and it was not till some person came to him from the consignee, that he confessed the real fact. Here then was a voluntary deviation from truth; and his conduct, in suppressing the true fact till it was extorted from him, goes much beyond the temporary caution which it may be sometimes necessary to practice, to conceal the real destination on clearing out from a belligerent country.

It is, besides, a strain of falsehood that runs through the whole case; for there is not one paper relating to the ship which does not contain some misrepresentation. Now the court has laid it down, that where gross misconduct is proved against the persons claiming an interest in the property, farther proof shall not be allowed. The cases in which the court has hitherto applied this rule, have been cases of purchase in an enemy's ports during the war; and it is attempted to clear this case from that imputation, by showing that the sale of this vessel took place eight years ago; and that the master did at the time migrate from Holland, and settle himself as a resident person at Weender.

If these facts were made out to my satisfaction, perhaps I should not be disposed to press the false destination as a conclusive circumstance. But what is the proof upon which I am to receive

these facts? If this assertion was true, it is reasonable to suppose there would have been some documents. The master [ \* 166 ] would have known the importance of proving the date \* of his purchase, by a bill of sale, or by a pass; but the pass is the only paper which connects him with the property of this vessel, and that is dated October, 1797. If it had been a pass of the last year it might have been said, there were others before; but it is a pass of the year 1797, and there is not a word importing it to have been a renewed pass. It is, beside, false on the face of it; for it describes the master as the sole owner, and purports to have been granted to him "*sibi soli*, on his appearance and personal oath;" whilst the truth is, according to the master's own deposition, "that he was not at Embden; but the pass was sent to him at Rotterdam, by Mr. Bracktezen, who obtained it on his oath." The pass, then, is falsified in this important point; and therefore forfeits all claim to credit in other particulars. It becomes an instrument to which the court can pay no attention.

It is, besides, a circumstance which very much confirms the suspicion of a later purchase of this vessel; that although the master speaks of former voyages, in general terms, when he enters on a detailed account, there is not a word said, relating to her history, before the year 1797. The pass is of that date; and the history of the vessel begins only from that time. This is a singular coincidence; and strongly convinces me that the transfer is not to be carried farther back.

With respect to the master's change of residence, what is there to satisfy me that it took place so long as eight years ago? The only paper on that point is No. 4, a certificate, stating "that [ \* 167 ] captain \* H. Jackson the younger, is a resident burgher of this place." It is dated July, 1795, and signed by Mr. Bracktezen the other claimant, as deputy of the county. It is singular that it should not state more particularly when, and from what place, he removed thither; and that when the great point to be established was, the time of his residence there, it should be entirely silent on that subject. The master's own account states, "that he removed from Vendam to Weender eight years ago;" that he still owns a "house in Vendam, which he lets; and has been there occasionally since; sometimes occupying apartments in his own house, and sometimes on visits to his friends." It is observable, however, that he never sailed from Weender, or from any other Prussian port. And it is, I think, a little extraordinary that, meaning to continue in the Dutch commerce, he should subject himself to the inconvenience of



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The Vrouw Hermina. 1 C. Rob.

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removing to a foreign port, from which he does not pretend ever to have navigated.

Upon the whole of this evidence, then, I do think there is no dependence to be placed on the master's account. If I look to the papers, there is not one that is not liable to great objections.

The pass is defective, as to time; and false, in representing the master to have been born at Wēender. The Embden pass is contradicted, as to the master's personal appearance, and his sole interest. Under these circumstances, I think no explanation which could be given, would satisfy me; and combining this with other considerations, that it is a Dutch ship, manned by a Dutch crew, and occupied in Dutch commerce, I think myself warranted to condemn [\* 168] this vessel as Dutch property.

Cargo reserved.

February 7. Mr. Fridag finding that he had made a mistake in claiming the vessel as the sole property of Bracktezende, when his instructions represented it as belonging two thirds to Bracktezende, and the other third to the master, petitioned the court to rehear this case.

For the captors it was contended, that it was not in the power of the court to grant this request; that the sentence having been pronounced and registered, could not now be revoked but by consent.

Court. This is an application to the court, on behalf of Mr. Fridag, to rescind the conclusion of a cause, and rehear it, on another statement of the claims; and the suggestion is, that Mr. Fridag, as agent, had made a mistake in claiming for one proprietor only, when the papers and his instructions represented the ship to be the joint property of Mr. Bracktezende and the master.

I will not go so far as to lay it down universally, that it is not in the power of the court to reconsider its decrees on very particular occasions; because I do not think it is necessary to discuss that point at present.<sup>1</sup> I consider the application to proceed from the feelings of an honorable mind, anxious to acknowledge and rectify its mistakes; and in that point of view it is highly creditable to Mr. Fridag; but I think it can have no legal effect. As a precedent it would be a practice highly dangerous; and the liberty of reviewing its decrees [\* 169] if it exists, which I do not affirm, is a liberty which the court would exercise with very great caution; because, I foresee, that were applications of this sort to be easily admitted, they would be

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<sup>1</sup> [See *The Monarch*, 1 W. Rob. 21; *The Hersteller*, 1 C. Rob. 119 a.]

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The *Neptunus*. 1 C. Rob.

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very frequently made on reasons much less sincere than those which are now offered to the court.

In this petition a reason is assigned for the lateness of the claim: "That Mr. Fridag had some scruples about the credit of his employer, as he had been obliged to have recourse to law to enforce a just demand against him." With this I have nothing to do; but with respect to the lateness of the claim, I will say, that was only *spinis e pluribus una* — it was but one circumstance out of many with which the case was oppressed.

Another circumstance which Mr. Fridag wishes to explain is, his misstatement of the claim. He claimed the ship for Mr. Bracktezende only, instead of claiming it as the joint property of Mr. Bracktezende and the master, "as he should have done, if he had had recourse to his papers."

I protest I think the case had as good a chance on a claim given at random, as if it had been made on these papers; for it must be extremely difficult to construct any claim upon them; no two agree. In one, the ship is represented as the property of the master; and that document purports to have been granted on the master's oath; but the master denies that he ever made such an oath. In his depositions he describes Mr. Bracktezende to be the sole proprietor; and

now Mr. Bracktezende states himself to be owner of two [ \* 170 ] thirds only; so that I cannot think \* but that the accident which has given Mr. Fridag so much concern, might have been fully as beneficial to the claimant as if the papers had been scrutinized with the greatest accuracy. There must have been great discordance under any arrangement. The cause has not, in my opinion, sustained any injury. Without discussing the power of reviewing a sentence, I think the reasons given do not sufficiently sustain the application, and therefore I reject it.

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THE NEPTUNUS, Kuyp, master.

January 28, 1799.

A blockade *de facto* expires *de facto*; but a blockade by notification is *prima facie* presumed to continue till the notification is revoked; this presumption throws the *onus probandi* on the claimant.

THIS was a case of a ship taken, coming out of the Texel, September 7th, 1798.

## JUDGMENT.

SIR W. SCOTT. This case comes on now, upon the ship only.

In the affidavit annexed to the claim, it is said, there is an authority given to claim the cargo, and that there are some facts which may take that part of the case out of the law which has been laid down respecting a breach of blockade. I shall, therefore, reserve that till a future day, saying at present only, that I shall expect the claim to be very special, and the proof to be very satisfactory as to the time when the transaction took place.

There are two questions respecting the ship; a question of property, and a question arising on a breach of blockade. As the Court has frequently decided, that neutral vessels breaking a blockade \* are liable to confiscation; if I am satisfied, that the [ \* 171 ] ship has been guilty of that offence, it may be unnecessary to enter into the former question, or to inquire whether the property belongs to the claimant, or to those Dutch merchants, Messrs. De Sylva, who have, in a letter found on board, certainly expressed themselves very much with the anxiety and the authority of owners.

The capture was made on the 7th of September, off the *Vlie* passage, by two English armed ships, about seven miles from the Dutch coast. The court has before laid down the rule,<sup>1</sup> that a blockade is broken as much by coming out with a cargo as by going in; and the only exception which the court has noticed in laying down this rule, is that of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade.<sup>2</sup>

There are two sorts of blockade; one by the simple fact only, the other by a notification accompanied with the fact.<sup>3</sup> In the former case, when the fact ceases, (otherwise than by accident or the shifting of the wind), there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend, *prima facie*, the blockade must be supposed to exist till it has been publicly repealed.<sup>4</sup> It is the duty, undoubtedly, of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it. To suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose any country \* would pursue. I do not say [ \* 172 ] that a blockade of this sort may not in any possible case ex-

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<sup>1</sup> Vide *supra*, The *Frederick Molke*, p. 86.

<sup>2</sup> [See notes to The *Vrouw Judith*, 1 C. Rob. 152.]

<sup>3</sup> [*Ibid.*]

<sup>4</sup> [*Ibid.*]

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The Exeter. 1 C. Rob.

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pire *de facto*, but I say, such a conduct is not hastily to be presumed against any nation. And, therefore, till such a case is clearly made out, I shall hold, that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked.

The notification of the blockade of this port was made on the 11th of June, 1798. The ship was in the Texel at the time; the owner was at Embden, and the blockade must have been perfectly well known there by the latter end of the month. Her duty was to have retired. But it is said, the cargo was Portuguese property, and purchased before the notification. Perhaps it might be so, but there could be no obligation on this Prussian vessel, to take it away. Instead of pursuing the prudent conduct of withdrawing just after the blockade began, in the months of July and August, this ship is employed in taking a cargo on board.

That it should be done with an intention of continuing there till the blockade ceased, is not probable. The presumption is, that it must have been done with a fraudulent design of slipping out, if any accident should afford an opportunity of escaping. In the month of September she sails, and is immediately stopped by these two armed vessels. But it is said, there was no blockade *de facto*, and that this small number of vessels only, is a proof that there was no efficient actual blockade. I am quite of a contrary opinion, for surely it is not necessary that the whole blockading force should lie in the [ \* 173 ] same tier; nor is it material that a vessel had escaped \* the rest. These ships were in the exterior line, as I understand it; and if there had been only these, I should have held them to be quite sufficient. It is unnecessary for me to consider, however, whether the blockade was continued by these ships or not, as the presumption being raised by the notification, it rests on the other side to prove the contrary.

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THE EXETER, Whitford, master.

(In the Instance, or Civil Court of Admiralty.)

February 1, 1799.

On a *primum decretum*, interest prayed, from the date of the decree to the obtaining of the proceeds of the vessel, was refused.

THIS was a case of a ship hypothecated at the Cape of Good

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The Exeter. 1 C. Rob.

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Hope, in several bottomry bonds, bearing date the 25th of November, 1797.

The holder of one of them having instituted proceedings, and obtained a *primum decretum*, or a decree of the court, for putting him into possession of the ship, June 22d, 1798; application was now made to the court, that he might be allowed interest from the date of the decree.

For the petition, *Swabey* argued, It would be very hard if this party should recover less on his bond than the other bond-holders; and merely because he had used greater diligence. Had he delayed to proceed till November, there could have been no question respecting the intermediate interest. It is, therefore, but a just demand that he should receive it now, notwithstanding the decree; as it is nothing more than what might have been effected if the other parties had not withheld their consent, especially \*since it is a [ \* 174 ] consent which the Registrar seems to have required unnecessarily. When bail is tendered, the other parties may have a right undoubtedly to notice, and may dissent if the security is bad; but it does not appear that their consent is necessary. The decree of sale, and possession of the proceeds, are but matters of form, and ordinary process, after the issuing of the *primum decretum*. The suspension of the sitting of the court during the last summer had prevented the party from applying to the court; and therefore he ought, in equity, to receive compensation for the delay, and be allowed interest equally with the other parties.

On the other side, the *King's Advocate*. It does not appear what injury can be imputed to the other parties for withholding their consent, if, as it is contended, their consent was not necessary. The Registrar thought it was necessary, and the act of the parties has been perfectly neutral; they did not take upon themselves either to consent, or to oppose the measure. On general principles, and in the practice of all courts, interest is not allowed to accrue after judgment. Vesey, jun. vol. ii. page ult. If there has been any inconvenience arising from the regular manner of proceeding, or from accidental circumstances, it is that *damnum sine injuria*, for which the parties can have no redress.

COURT. Let me ascertain the correct practice of the court. This *primum decretum*, I perceive, gives not only possession of the ship, but of the proceeds also. Is not that going a step too far?

*Swabey*. I fear that is irregular.

[ \* 175 ] \* JUDGMENT.

SIR W. SCOTT. This is an unfortunate insolvent case in which the court would feel no inclination to give to any one claimant more than he could legally demand.

It appears that a *primum decretum* was obtained so long ago as last June, but in obtaining it, the party seems to have gone farther than the forms of the court would allow. The effect of that decree should be only, in the first instance, to put the party into the possession of the thing. All further proceedings of sale, and power over the proceeds, should be by subsequent application to the court. In this case, the ship was sold without application to the court. When the court signed the decree, it could not have been aware that the tenor of the decree was not in the usual form, and that it went farther than such a decree should go, in concluding with a power over the ship and proceeds.

I think much of the inconvenience of the party has arisen from this irregularity. When application was made to the Registrar, in August, to deliver out the proceeds, he refused, rightly, in my opinion, to pay on that instrument, without the consent of all parties.

Interest after judgment is not usually allowed. But if the other party occasioned unnecessary delay, I see no reason why, in equity, interest after judgment might not run. If that had been the case, I should have found no difficulty ; as it is, the opposition was perfectly justifiable. It is said, that an earlier application to the court could not be made during the latter part of last summer. That was an unfortunate circumstance, but unavoidable. Upon the [ \* 176 ] \* whole, I am of opinion, that it is impossible to decree interest in this case.

May 4. On this ship another application was made to the court, respecting the priority of one of several respondentia bonds given at a former period of the voyage, at Bombay, in December, 1796. The facts were: the vessel being on a voyage from Bengal to London was obliged to put back to Bombay to repair. The master being in want of money, advertised in the Bombay Courier of the 12th of November, 1796, for the loan of certain sums of money ; not less than 5,000, nor more than 40,000 rupees, to run at respondentia, on the security of the ship and her freight. Three tenders were made ; one on the part of G. Hall for 8,000 rupees, on the 16th of November ; one on the part of Forbes and Smith for 5,000, at the same time ; and one on the part of Major Thompson for 8,000 rupees, on the 14th of December.

The tenders were accepted, and the money advanced at the same

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The San Bernardo. 1 C. Rob.

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time. The bonds of Hall and of Thompson bore date the 14th December; but the bond of Forbes and Smith bore date the 8th of December, 1796. The proceeds of the ship proving insufficient to pay all demands, an application was made on the part of Mr. Forbes, that he might have a preference in respect to the priority of the date of his bond. The evidence arose from the affidavit of Captain Whitford, who produced the original advertisement in the Bombay Courier for the tenders, and made oath, "that, as he best recollects, he received the respective sums therein mentioned, at \* the [ \* 177 ] same time, and the same were all expended on the same aforesaid refitment.

"That he believes the said tenders were respectively made, and the said several sums advanced by each of the parties, with the knowledge and privity of each other. That he believes no preference, in regard to the repayment thereof, was expected by either of the said parties; and that he never meant or intended to give any preference whatever to either of them therein.

"That he has since understood that the aforesaid respondentia bond, by him so given to Mr. Forbes and company, was dated a few days prior to the other respondentia bonds given to G. Hall and Major Thompson. But he can by no means account for the same, as all the said bonds ought to have borne date on one and the same day; inasmuch as he verily believes they were executed at the same time."

The court, after the reading of this evidence asked, whether these facts were denied; it being answered, they were not,

COURT. As it appears the parties acted in privity and concert with each other; as the money was advanced on the same general invitation, for the same repairs, in which all were equally interested, and on the same terms; the payment must be *pro rata*, without any preference.

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\* THE SAN BERNARDO, Laretta, master. [ \* 178 ]

February 1, 1799.

On salvage the master and crew are strictly the only salvors.

The owners claim only under the equitable consideration of the court for the risk of their vessel, &c.

The court is not disposed to allow their claim to any great amount.

THIS was a case of a Spanish ship retaken from French captors, in distress, by an English non-commissioned vessel.

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The Mentor. 1 C. Rob.

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The property becoming a droit of Admiralty, it was referred to the court to fix the proportion of reward due to the salvors. The value of the property saved was estimated at 12,000*l*.

The *King's Advocate* proposed a sixth. The court thought that was too little and decreed a third. *Arnold* then prayed the court to distribute that sum, and to allot a considerable portion of it to the owners of the British vessel, in consideration of the risk of their ship and cargo, and also of the danger of forfeiting the policies of insurance by deviation. It being asked by the court what was the ordinary proportion of sharing between the owners of privateers and their crews; it was said, that the most general division is, three fourths to the owners, and one fourth to the crew, although it is sometimes in moieties, according to particular agreement.

COURT. This is a case of no very great exertion. The principal merit consisted in taking possession, and in guarding so many people. The master and crew are in strict language the only salvors. The owners have in general no great claim; as to labor and danger none.<sup>1</sup> They come in only under the equitable consideration of the court for damage or risk, which their property might have incurred. In [ \* 179 ] general, I shall not be disposed to admit the claim of \*owners to any large amount. I may consider their possible risk, but I shall not extend that too far. In the present case, as the parties seem to have agreed upon the matter, I shall do what I shall not be disposed to do in other cases. I shall give 2,000*l*. to the owner; to the master 1,000*l*. and the remainder to the crew, giving the mate a double share with them.

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THE MENTOR, Cambell, master.

February 5, 1799.

The actual wrong doer is the only person responsible in the Court of Admiralty for injuries of seizure; a suit dismissed against the admiral of the station being not privy to the fact.

THIS was a case of an American ship, destroyed by his Majesty's ships *The Centurion* and *Vulture*, (part of Admiral Digby's squadron,)

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<sup>1</sup> [The Haase, 1 C. Rob. 286.]



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The Mentor. 1 C. Rob.

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cruising off the Delaware, in the year 1783, after the cessation of hostilities, but before that fact had come to the knowledge of either of the parties.

**JUDGMENT.**

**SIR W. SCOTT.** In this case, which comes before me for judgment, the loss which the claimant has sustained is extremely to be lamented. But it has been well observed by the counsel, that it must be on legal grounds only that I can give him redress; and if there are legal grounds that impose upon the court an incapacity of affording redress, I may lament it, but I cannot give relief, upon mere grounds of humanity. Humanity is only the second virtue of courts; justice is unquestionably the first. And justice would be grossly violated by providing a relief for one innocent man at the expense of another, who is not legally subject thereto.

\* The case, I have said, is an unfortunate one. It is like- [\* 180] wise a case extremely peculiar in its circumstances; and the first peculiarity I shall notice, is the commencement of such a suit at the distance of near seventeen years from the transaction.

It is not within my recollection, that a case of such antiquity has ever been suffered to originate in the court. I do not say that the statute of limitations extends to prize causes; it certainly does not. But every man must see that the equity of the principle of that statute in some degree reaches the proceedings of this court; and that it is extremely fit that there should be some rule of limitation provided by the discretion of the court, attending only to the nature and form of the process conducted here, by which captors or other persons should be protected against antiquated complaints.<sup>1</sup> And if there is any case of remote antiquity, which ought not to be entertained, undoubtedly, that would be one in which it clearly appeared that the party complaining had been fully apprized of the nature of his injury, and of the mode of redress which he ought to have pursued.

That brings me to the second peculiarity in this case, which is, that there was a suit in this very court, upon this very subject, ten years ago, not indeed against the same party, but instituted by the same party who now complains, and who was as perfectly in possession of all the facts of his case at that time, as he is at this present moment.

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<sup>1</sup> [As to the effect given to lapse of time in Admiralty Courts, in England, see *The Rebecca*, 5 C. Rob. 102; *The Susanna*, 6 C. Rob. 48; *The Molly*, 1 Dod. 394; *The Jonge Jan*, 1 Dod. 453; *La Madonna &c.*, 2 Hagg. Ad. R. 289; *The Huklah*, 3 C. Rob. 235. In America, *Brown v. Jones*, 2 Gall. 481; *Willard v. Dorr*, 3 Mason, 161; *The Brig Sarah Ann*, 2 Sumn. 206; *The Mary*, 1 Paine, 180.]

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The Mentor. 1 C. Rob.

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The third peculiarity, I must notice, is an entire novelty in a prize cause, namely, that it is a proceeding for calling to adjudication, not the immediate alleged wrong doer, but a person who was [ \* 181 ] neither present at \* nor cognizant of the transaction, and who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority ; for as to particular orders applying to this transaction, it is not pretended that any were given or could be given. He was only the admiral on the general station, and the ships which committed the alleged outrage were under his general command, but at a great distance from him.

Now, really it appears to me, that it is the very first time that the attempt has been made in a prize cause, to pass over the person from whom the alleged injury has been received, and to fix it on another person, on the ground of a remote and consequential responsibility. And I call upon the experience of persons attending in this court, to state, whether there is an instance of that kind to be found in the annals of the court.<sup>1</sup>

The actual wrong doer is the man to answer in judgment ; to him responsibility is attached in this court. He may have other persons responsible over to him, and that responsibility may be enforced. As for instance, if a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act. But it is the constant practice of this court to have the actual wrong doer the party before the court, and every man must see the propriety of that practice ; because if the court was once to open the door to complaints founded on a remote and consequential responsibility, [ \* 182 ] where is it \* to stop ? If a monition is to go against the admiral, for not issuing his revocatory orders, a monition might, in like manner, go against the Lords of the Admiralty, for a similar neglect ; or against the Secretary of State, for not issuing similar directions to the Lords of the Admiralty ; and these persons might be made parties in a prize cause, and called upon to proceed to adjudication.

If the legal responsibility is to be shifted from the actual captor, to whom is the claimant to look ? Where is he to find the responsibility, in the chain of persons, who may be, some how or other, involved in the different stages of the transaction ? Where is he to find his wrong doer, if you once take off that character from the person who immediately commits the injury ? Where is he to resort, if you take from

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<sup>1</sup> [See The Athol, 1 W. Rob. 374, 380.]

The Mentor. 1 C. Rob.

him that easy and direct resort with which in the present understanding of the law he is provided? I am most clearly, on this ground, of opinion, that Admiral Digby alone cannot be compelled to proceed to adjudication under this monition.

The circumstances of the case, as far as it is necessary to state them, are these: The ship being American property, was on a voyage from the Havana to Philadelphia; off the Delaware she was pursued by his Majesty's ships The Centurion and The Vulture, then cruising off that river, under the command of the admiral on that station, Admiral Digby. All parties were in complete ignorance of the cessation of hostilities; not only the persons on board the king's ships, but the Americans, as well those on the shore, as those on board the vessel. In the pursuit, shots were fired on both sides, and it is alleged on the part of the British, that the [\* 183] ship was set on fire by her own crew, who took to the shore.

Now, I incline to assent to Dr. Laurence's position, that if an act of mischief was done by the king's officers, though through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles, a place or district was put under the king's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize, to show that he had been injured by this breach of the peace, and was entitled to compensation; and if the officer acted through ignorance, his own government must protect him. For it is the duty of government, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless, at the expense of that government whose duty it was to have given that notice.

I am, therefore, inclined to think, that the determination of the judge in the former case did not turn upon the mere circumstance of ignorance on the part of the king's ships, but that looking at all the circumstances under which the event took place, and considering their just and legal effect, he was of opinion upon the whole result, that the protest on the part of the captors was well [\* 184] sustained. If that opinion of the judge was erroneous, an appeal ought to have been prosecuted. No appeal was prosecuted, though such a purpose was formerly declared, and a protocol entered, but no farther proceedings were pursued thereon.

Mr. Wilson states in his affidavit, "that distress of fortune pre-

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The Mentor. 1 C. Rob.

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vented him from proceeding further." I have to lament that, as well as many other circumstances that accompany the case, but courts of justice must pursue the legal modes; they cannot bend to the private distresses of individuals. If an appeal is not prosecuted, the conclusion of law is, that the party acquiesces in the decision.

Now, what did the judge determine? He determined this: that the act of destruction which took place, took place under such circumstances that the captor was not compellable to proceed to adjudication upon it. And shall I, at the distance of ten years, after he has determined that the actual captors were subject to no responsibility at all, determine that Admiral Digby, a person totally ignorant of the whole transaction, at the distance of thirty leagues from the place where it passed, and utterly unprovided with all the means of defence, which either a knowledge of the fact, or a possession of evidence can supply, is liable, after a lapse of seventeen years, to be called upon to proceed to adjudication; or in other words, to justify the destruction of this vessel, or failing therein, to be answerable in damages? Surely such a determination could be founded on

[ \* 185 ] nothing but a determined opposition to every principle \* of law and justice by which the proceedings of this court have been directed, ever since it bore the shape of an established court of justice.

Having said this, I shall decline entering minutely into the circumstances of the case, which have been rather alluded to than particularly discussed by the counsel. I feel for the misfortunes of the claimant. He has applied to this court, and he was judicially informed ten years ago, that the loss he has sustained was not of that nature which would entitle him to support an action for damages against the persons whom he considered as the immediate wrong doers; still less can he be entitled to support it against the person who is the object of the present suit. And I, therefore, with the fullest conviction of mind, discharge Admiral Digby from the effect of the present monition.

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[ \* 187 ]                      \* ORDER OF COURT.

July 3, 1799.

THAT in all motions for commissions and decrees of appraisement

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<sup>1</sup> The Editor has brought forward this Order without regard to its date, that, as a matter of public regulation, it might be inserted as early as possible. Vide *infra*, 2 C. Rob. 45.

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The Jonge Margaretha 1 C. Rob.

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and sale, the time shall be specified within which it is prayed that the commissions or decrees shall be made returnable.

That the Commissioners and Marshal make regular returns on the days on which their commissions or decrees are returnable, stating the progress that has been made in the execution of the commissions or decrees; and, if necessary, praying an enlargement of the time for completion of their business.

That the Commissioners and Marshal bring in the proceeds which have been collected at the same time with their returns; and that if the whole proceeds have not been collected, they retain only such sums as may be required to answer accruing expenses.

That on the return of commissions or decrees the Commissioners or the Marshal bring in all vouchers.

That no cause shall be put upon the list for hearing, [\* 188] where any commission or decree of appraisal and sale is outstanding, and the proceeds not brought into the registry, without special application to the court to dispense with this Order according to the circumstance of the case.

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\* THE JONGE MARGARETHA, Klausen, master. [\* 189]

February 5, 1799.

Provisions are not contraband but under particular circumstances. Their contraband nature how determinable.<sup>1</sup> Cheeses sent by a Papenberg merchant from Amsterdam to Brest condemned.

This was a case of a Papenberg ship, taken on a voyage from Amsterdam to Brest, with a cargo of cheese, April, 1797.

For the captors, the *King's Advocate* contended that the ship and

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<sup>1</sup> [As to when provisions will be contraband see *The Zelden Rust*, 6 C. Rob. 93; *The Frau Margaretha*, 6 C. Rob. 92; *The Ranger*, 6 C. Rob. 125; *The Edward*, 4 C. Rob. 68; *The Haabet*, 2 C. Rob. 182; *The Commerce*, 2 Gall. 264, and S. C. 1 Wheat. 382; *Maisonnaire v. Keating*, 2 Gall. 235; 1 Kent, 137, 138, 139.]

confiscable, as contraband of naval equipment. The ship, *Jansen*, in which the cargo was sent to Brest,<sup>1</sup> was condemned, and the cargo.

*objection.* It is contended, that the property of the same was concerned in a contraband of commerce, and not in a contraband of war. Groves, and specifies some circumstances, and specifies some circumstances, but those circumstances, such as the relief of places, are not free from exception, unless in some circumstances.

Of great severity, they have been under the law of England, and the facts. The case on which the facts—the papers were false, and the cargo was sent to another; and the cargo was in a state—of a quantity of salted cheese, and the ship was considered French victualler, and condemned. On precedents, the claimants are cited in point have been cited against the other side, a variety of old cases in which it was not contraband. In 1747, *The Amsterdam to Bordeaux*; 3d of *Amsterdam*, a Prussian ship from Amsterdam, where there were many articles given up, and were restored with this dictum, "and not merely ship's provisions." Cheese is in no state different from other consumption on land, as well as been no instances in which this was the case in the present or in the last war; and the claimants are entitled to restitu-

which cheese has been restored; but the circumstance of a destination to ports

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The *Jonge Margaretha*. 1 C. Rob.

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of naval equipment? I shall defer this case, that more precedents may be examined; and in the mean time I direct an inquiry to be made as to the particular nature and quality of these cheeses, by some officer of the king's stores.

On the 20th of March, the store-keeper's certificate was produced, stating them "to be such cheeses as are used in English ships' stores, when foreign cheeses are served, and such as are used in French ships almost exclusively of others."

#### JUDGMENT.

SIR W. SCOTT. There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question, Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest or Morlaix (it is said) but certainly to Brest; or as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war — of provisions which are a capital ship's store — and to the great port of naval equipment of the enemy?

\* If I adverted to the state of Brest at this time, it might be [\* 192] no unfair addition to the terms of the description, if I noticed, what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a British fleet which lay off the harbor for the purpose of defeating its designs. Is the carriage of such a supply, to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese, being a provision, is universally contraband, the question would be readily answered; but the court lays down no such position. The catalogue of contraband has varied very much,<sup>1</sup> and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty,

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<sup>1</sup> [For a note as to the treaty stipulations of the United States respecting contraband, see *The Twende Brodre*, 4 C. Rob. 33.]

The *Jonge Margaretha*

cargo, belonging to the same person, was seized, and was found to be contraband. "I do not think," says the court, "that it has been published, or that it has been laid down as to the ship, carrying salted beef from a neutral country, that it should be deemed contraband."

For the claimant, it is argued that the cargo was seized at that time confidentially, and that the person of great knowledge, who was the owner of the ship, was not a person of great knowledge. In much later cases, the court has been condemned as contraband, and the cargo, going to Rochelle, was seized. At the same time was more than one instance, as stated by Dr. Swabey, I don't think that the probability the cheeses were for the ship's use. Salted cod was seized, and the cargo, Frederick, going to Rochelle, was seized. These instances show that the cargo, at least where it was for naval or military use, was laid down upon this matter. The court, however, of the continent, although the court may, under circumstances, have the modern established rule to contraband, but may become so out of the particular situation of the parties engaged in it. "The court," says the court, "is of the circumstances under which

Under the French law, the cargo was never been considered as contraband, except in conjunction with the cargo. The captors rely was contrary to the voyage was from the cargo, which consisted of articles in the cargo, and beef. The cargo was seized in the adopted rule, as such. If the case is entitled to argue that the cargo is not contraband; but that the cargo is not contraband, which cheese is not contraband. Endraught, a Dutch ship, was seized in March, 1747, and was seized in Bordeaux as contraband. "that they were

In the present case, the court is of the opinion that the cargo is not contraband. "that they were" [ \* 191 ] what is the cargo is not contraband. The article has been seized, and therefore the cargo is not contraband.

COURT.  
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pour la guerre, et dont on empêche le commerce de contrebande. Telles sont les armes qui servent à la construction, & à l'armement des vaisseaux, & de même en certaines occasions, où Vattel book iii. ch. 7, sect. 112.



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The *Jonge Margaretha*. 1 C. Rob.

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of nations is shown, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavorable consideration, being a manufacture prepared for immediate use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although \*occasionally a frigate or other ships of [ \* 195 ] war, may be constructed in that port. Contra, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

In the case of *The Endraught*, cited for the claimant, the destination was to Bordeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation,<sup>1</sup> in the same manner as Brest is universally known to be.

The court, however, was unwilling, in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties \* to exhibit affidavits as to their nature and quality. The [ \* 196 ] claimant has exhibited none; but here are authentic certifi-

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<sup>1</sup> Agreeably to this distinction Dutch cheeses going from Amsterdam to Bordeaux, on account of a merchant of Altona, were restored on farther proof. *The Welvaart*, Kwest, Aug. 27, 1799.

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The Hoop. 1 C. Rob.

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cates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

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THE HOOP, Cornelis, master.

February 13, 1799.

British merchants are not at liberty to trade with the enemy without the king's license;<sup>1</sup> all property taken in such a trade, is confiscable as prize to the captor.

THIS was a case of a claim of several British merchants for goods

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<sup>1</sup> [Schooner *Rapid*, 1 Gall. 295; S. C. 8 Cranch, 155; The *Joseph*, 1 Gall. 545, 550, 551; The *St. Lawrence*, 1 Gall. 470; S. C. 9 Cranch, 120; The *Alexander*, 1 Gall. 532; The *Mary*, 1 Gall. 620; The *Hiram*, 8 Cranch, 444; *Scholefield v. Eichulburger*, 7 Peters, 586; 1 Kent, 66 to 69; *Mitchell v. Harmony*, 13 How. 115; *Potts v. Bell*, 8 T. R. 548, overruling 1 B. & P. 345; *Willison v. Pattison*, 7 Taunt. 439; *Ex parte Baglehole*, 18 Ves. 528; The *Madonna delle Gracie*, 4 C. Rob. 195; The *Nelly*, 1 C. Rob. 219, n.; The *Odin*, 1 C. Rob. 248; The *Charlotta*, 1 Dod. 387; The *Jonge Pieter*, 4 C. Rob. 83; Carriage of passengers to enemy's port is illegal; The *Rose in Bloom*, 1 Dod. 57. As to trade by a citizen resident in a neutral country, see note to The *Neptunus*, 6 C. Rob. 409. As to trade with the enemy by allies, see note to The *Nayade*, 4 C. Rob. 251. Trading under an enemy's license is illegal; The *Julia*, 1 Gall. 595; and S. C. 8 Cranch, 181; The *Alexander*, 1 Gall. 532; and S. C. 8 Cranch, 169; The *Hiram*, 1 Wheat. 440; The *Ariadne*, 2 Wheat. 143; The *Aurora*, 8 Cranch, 203; 15 Johns. 352; 18 Johns. 87; 1 Pet. C. C. R. 410; The *Louisa*, 1 Hay and Marriott, 143; *Contra*, 12 Mass. 176; 1 Conn. 571. As to withdrawing goods purchased before the war, see *Amory v. McGregor*, 15 Johns. 24; *Madonna delle Gracie*, 4 C. Rob. 195; The *Juffrow Catharina*, 5 Rob. 141; The *Rapid*, 1 Gall. 304; The *Mary*, 1 Gall. 621; The *St. Lawrence*, 9 Cranch, 121; The *Frances*, 8 Cranch, 335; The *Merrimack*, 8 Cranch, 317. For treaty stipulations on this subject, see note to The *Juffrow Catharina*, 5 C. Rob. 141.]

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The Hoop. 1 C. Rob.

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purchased on their account in Holland, and shipped on board a neutral vessel.

The affidavit annexed to the claim set forth, that Mr. Malcolm of Glasgow, and several other merchants of North Britian, had, long prior to hostilities, been used to trade extensively with Holland, in the importation of various articles of the produce of Holland, \*which were particularly wanted for the use of Glasgow, [\* 197] and essentially necessary to the agriculture and manufacture of that part of the kingdom; that, after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his majesty in council, permitting them to continue that trade; that after the passing of the acts of parliament, 35 Geo. 3, c. 15<sup>1</sup> and 80; 36 Geo. 3, c. 76; 37 Geo. 3, c. 12, confirming and continuing the orders of council of the 16th and 21st January, it was apprehended in that part of Great Britain, that by these acts the importation of such goods was made legal. But for the greater security, they still made application to the commissioners of customs at Glasgow, to know what they considered to be the interpretation of the said acts, and whether his majesty's license was still necessary; and that in answer to such application, the merchants were informed, under the opinion of the law advisers of the said commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces, would in future \*be entered [\* 198] without them; and that in consequence of such information, they had caused the goods in question to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers.

#### JUDGMENT.

SIR W. SCOTT. This is the case of a ship, laden with flax, madder, geneva, and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of

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<sup>1</sup> The 35 Geo. 3, c. 15, (16th March, 1795,) reciting and confirming the orders of council of the 16th and 21st of January, (which allowed goods coming to ports of this kingdom directly from any port of Holland, and navigated in any manner, to be landed and secured in warehouses for the use of the proprietors till farther orders,) enacts, that it shall be lawful to import such goods belonging to subjects of the United Provinces, or to any who were subjects before the 19th of January, 1795, or to any subject of his majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue. The subsequent acts contain farther regulations for property coming from Holland, in the ambiguous situation of the two countries at that time.

which I see no reason to doubt the truth) the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the commissioners of the customs in Scotland, that they might be lawfully imported without any license, by virtue of the statute 35 Geo. 3, c. 15 and 80.

It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down

by Bynkershoek as an universal principle of law — *Ex natura*

[ \* 199 ] *belli commercia inter hostes cessare non est dubitandum.*

*Quamvis nulla specialis sit commerciorum, prohibitio ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, &c.* He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes.*<sup>1</sup> But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*. It appears from these passages to have been the law of Holland; Valin, l. iii, tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels. It will appear from a case which I shall have occasion to mention (The Fortuna,) to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the

[ \* 200 ] \* expediency of such occasions on their own notions of com-

<sup>1</sup> Bynk. Q. J. P., book i, c. 8.

merce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue or to sustain in the language of the civilians *\* a persona standi in judicio*. The peculiar law of our own [ \* 201 ] country applies this principle with great rigor. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy,<sup>1</sup> unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice*. But otherwise he is totally *exlex*; even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have

<sup>1</sup> [See note to *The Pere Adam*, 1 Hay and Marriott, 141, for cases enforcing this doctrine.]

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which I see no reason to doubt the truth) the reported on account of British merchants, being of considerable use in the manufactures and exports, and being brought under an assurance from the customs in Scotland, that they might be lawfully imported, any license, by virtue of the statute 35 Geo. 3.

It is said that these circumstances constitute a great indulgence; and I do not deny it. But on the subject binding the court, I must be satisfied; though it leads to consequences which I look to the particular intention of the law.

In my opinion there exists such a general principle of this country, by which all trade is unless with the permission of the sovereign, a principle peculiar to the maritime law, as stated by Bynkershoek as an universal principle.

[ \* 199 ] *belli commercia inter hostes.*

*Quamvis nulla specialis sit.*

*jure belli commercia esse vetita, ipsorumque.*

&c. He proceeds to observe, that the necessity of obtaining certain commodities, has empowered this rule, that different species of goods, *pro ut e re sua, subditorumque sua*, is in all cases the act and permission of the sovereign; if it is permitted, it is a suspension of the general principle, it expresses it, *pro parte sic bellum est in principio*. It appears from the case of *Holland v. Valin*, L. iii, tit. 6, that in France, whether the trade is in British or in neutral vessels. It will be an occasion to mention (The *Hoop*), and it may, I think, with great propriety, be a general principle of law in this country.

By the law and constitution of this country, the sovereign has the power of declaring war, and has the power of entirely suspending the commercial intercourse which is permitted, may be occasions on which the law is suspended. But it is a general principle of law in this country.

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Mr. Fetherstonhagh,

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March. 1747.

property of British subjects

27th January, 1749; pre-

Right Hon. W. Pitt, Mr.

Held. "that a British

any, but that the "only pun-

dict was confiscation of

3d April. 1781, a case

London, for wines and other

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shipped on board a Dutch ship, April 7, 1780, at Malaga, for

The affidavit of the claim stated, that Mr. Escott was one of a house of trade, known by the name of Escott and Read, of London; that they had for twenty years immediately preceding hostilities between Great Britain and Spain, carried on considerable trade to and from Malaga, and had an established house of trade at Malaga, where Mr. Escott had resided about thirty years preceding, excepting the last ten months, when he had left that place, and had since resided in England. It farther stated, that considerable quantities of wine and other merchandise, belonging to the said house (deposited in vaults and warehouses set apart for the same) had been left at Malaga under the care of Mr. Grivegne, a Fleming by birth, brought up in that house, who was suffered to remain to preserve the said goods during hostilities, unless a favorable opportunity should offer of sending them to London. It stated the destination to have been to Ostend, and the property to have been described for neutral account and risk, to avoid the enemy's cruisers; and claimed the whole as the entire property of the house of London, out of which Mr. Grivegne was to receive 14 per cent. but no other emolument whatever.

The judgment of the Court of Admiralty rejecting the claim of Mr. Escott was affirmed; present, \* the Earls of Bathurst, Sandwich, Marchmont, Hillsborough, Clarendon, Viscount Stormont, Lord Grantham, Lord Loughborough, chief justice of the Common Pleas, Sir Richard Worsley, Sir J. Goodricke, Sir J. Eardley Wilmot.

In *The St. Louis*, alia *El Alessandro*, Lords, July 18th, 1781, the case of a claim of Messrs. Morgan and Mather for certain peltries shipped by them on board a vessel of New Orleans, bound to Bordeaux, and consigned to merchants there, on the proper account and risk of the shippers.

The affidavit stated the history of Mr. Morgan from the year 1764, when he left England to settle in West Florida, and his subsequent transactions from 1774, on the river Mississippi; where, finding no troops nor any sort of protection granted by the British government to those settled on the British part of the banks of that river, he had kept a ship as a floating storehouse, living himself at New Orleans by permission of the governor, under an express condition that he should not land any sort of goods in any part of the Spanish dominions. It then stated, that in 1779, finding the American troops in such force all over the river as to prevent any English ship from coming up the

<sup>1</sup> [Better reported in 1 Bos. and Pul. 349, n.]

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river, and that it was impossible to make any remittances to England but by hiring neutral vessels, he shipped the goods in question on board the *St. Louis*, 27th April, 1779, belonging to inhabitants of New Orleans, at that time neutral subjects, that being the only vessel at New Orleans bound to any port of Europe; that they were consigned to merchants at Bordeaux, to be there sold, and the proceeds remitted to Mr. Mather in London; that he was obliged to resort to [ \* 205 ] \* this mode of remittance that the goods might not perish on his hands.

Annexed to the affidavit was a certificate of Colonel Dickson, the British commander in those parts, certifying that Mr. Morgan,<sup>1</sup> a British subject, had received permission under the twelfth article of the capitulation of Baton Rouge, to convey himself and family to London under a passport from the Spanish governor.

The sentence of the Court of Admiralty, condemning the [ \* 205a ] ship and cargo as enemy's property, or otherwise \* liable to confiscation, was affirmed; present, Earl of Bathurst, Earl of Clarendon, Lord Loughborough, chief justice of the Court of Common Pleas.

In *The Compté de Wohronzoff*, Lords, 19th July, 1781, a case of a claim of Mr. Daly, Mr. G. Byrne, and other Irish merchants, for the ship and certain quantities of French wines shipped at Bordeaux, May, 1780, on their account, with ostensible papers for Russia. It was stated in support of their claim, that during the whole of the war the commissioners of his majesty's revenue and excise in Ireland, had constantly permitted trade to be carried on from Bordeaux to Dublin, in the same manner as it was before hostilities commenced;

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<sup>1</sup> In *The Victoria*, Lords, July 20th, 1781, the property of the same gentleman, Mr. Morgan, in the ship, purchased of a Spanish subject, 21st April, 1779, and in the cargo shipped at New Orleans, 16th April, 1779, and consigned to London, was restored.

The circumstances of that case were, that Mr. Morgan had shipped the goods, 16th April, 1779, on board a Spanish ship, bound to a Spanish port; but afterwards the destination was altered for London. On the 20th the ship sailed; but the master hearing in the river that there was a prospect of approaching hostilities between England and Spain, returned, and refused to proceed, unless he was indemnified against all loss. Mr. Morgan then purchased the ship of the master. She sailed for London, with the Spanish master and crew, and under Spanish colors, and was captured 7th June, 1779, by a privateer commissioned against France. The order of Council for reprisals against Spain issued 18th June, 1779.

The *præsertim* of the appeal stated the transfer of the ship to have been a fictitious transfer, and that Mr. Morgan was at the time of the transfer a Spanish subject, residing and carrying on trade at New Orleans; that by the proofs, the ship and cargo appeared to be Spanish property, and as such, being taken by a privateer having no commission against Spain, they were to be condemned as *droits of admiralty*.

Mr. Morgan returned to England after the capitulation of Baton Rouge, and arrived in London, 29th July, 1780.



and all ships belonging to British owners, navigated according to law, with cargoes the property of British owners, coming immediately and openly from Bordeaux, had been and still were admitted \* to enter and invoice their cargoes from thence ; and that [ \* 206 ] on all cargoes so entered the regular duties had been paid.

An act of parliament was recited, passed in Ireland in the 19th and 20th of his present majesty, by which it is enacted, that from the 24th of June, 1780, till the 25th of December, 1781, there should be paid an additional duty of 10*l.* 7*s.* per tun on all French wines imported into the kingdom of Ireland during the said period. The practice of admitting such cargo to an entry was proved by an extract from the entries office, by which it appeared that several cargoes of a similar nature had been permitted to enter. And it was contended, that the act of the Irish legislature was decisive, as far as it was competent for them to decide, being made long after the commencement of hostilities, as it could not be imagined that they would be inattentive to public affairs, or propose to draw a revenue from a trade prohibited and illegal.

The judgment of the Court of Admiralty, condemning the ship and cargo as good and lawful prize, was affirmed, and the appellant was condemned in the costs of the appeal ; present, Earl of Bathurst, Earl of Hillsborough, Earl of Clarendon, Lord Loughborough, chief justice of the Common Pleas.

In *The Expedite van Rotterdam*, Lords, 18th July, 1782, a case of the claim of Messrs. Gregory and Turnbull of London, for a quantity of wine and other articles shipped on board a Dutch ship, December 20th, 1780, at Malaga, for them, though ostensibly for the account and risk of Mr. Carl Thomasze of Amsterdam, their agent, Holland being then at peace with this country.

\* The affidavit of the claimant recited an act, passed in [ \* 207 ] the 20th year of his majesty's reign, to permit goods, the product or manufacture of certain places within the Levant or Mediterranean seas, to be imported into Great Britain or Ireland, in British or foreign vessels from any place whatsoever, enacting that, from the 1st of January, 1780, any goods which had been usually imported from any port or place in Europe, within the Straits of Gibraltar, (with an exception respecting the dominions of the Grand Signior), should and might, during the continuance of the said act, be imported and brought by any person or persons whatsoever, into Great Britain or Ireland, in any ship belonging to any state in amity with his majesty. The affidavit stated, that the importation had been in every respect conformable to the said act, and that the said goods were coming for the sole account, risk, and benefit of their house, being

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described in the bill of lading to be at the account and risk of Carl Thomasze, only to avoid the enemy's cruisers.

The judgment of the Court of Admiralty condemning these goods was affirmed; present, Lord Camben, Earl of Effingham, and Lord Ashburton.

In *The Bella Guidita*, Lords, 20th July, 1785, a case of a claim of Mr. Vaughan and other British merchants, sending a cargo of provisions on board a Venetian vessel from Ireland to Grenada, one of the islands then lately taken by the French.

"The affidavit of claim set forth the particular situation of that and the other islands, since they had fallen into the possession of the French; that they were not considered by the French government as entirely French islands; that by a certain ordinance [ \* 208 ] of the French king, it was ordained that the merchants and inhabitants of all or most of the conquered islands should, as to their trade and commerce, be upon the same terms and footing as the British merchants and inhabitants of the island of Dominica; that by the 17th article of the capitulation of the island of Dominica, in 1778, it was permitted to the merchants of the said island, until peace, to receive vessels (except English) to their address from all parts of the world, without their being confiscated; that before Dutch hostilities broke out, the trade between the conquered islands and Great Britain, had been carried on through the island of St. Eustatius, under the sanction of British acts of parliament, for the purpose of supplying the islands with provisions absolutely necessary for their subsistence; and of taking off the produce in payment to British merchants, as the only means of keeping down the interests due to them on mortgage on the plantations.

"That after the Dutch hostilities, it became notorious to the British government, that the obstruction of this trade would be attended with very serious consequences to the British interests in the said islands, and under these considerations an act was passed in the 20th Geo. III. reciting, That during the said hostilities the islands of Grenada and the Grenadines had been taken by the French king, but it was just and expedient to give every relief to the proprietors of estates in the said islands; and enacting, That no goods or merchandise of the growth, produce, or manufacture of the said islands, on board neutral vessels, going to neutral ports, should be liable to condemnation as prize.

"That under this view of the necessitous situation of the [ \* 209 ] said island, and of the favorable manner in which it was considered by the government of this country, the claimants chartered this ship to carry out a cargo of provisions to Grenada, and

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bring back in return a cargo of the produce of that island; that there was an ostensible destination to St. Thomas merely for the purpose of avoiding the enemy's cruisers.

"The judgment of the Vice Admiralty Court of Barbadoes, condemning the cargo as French property, was affirmed, and the appellant condemned in the costs of appeal; present, Lord Camden, president of the council, Earl of Effingham, Marquis of Caermarthen, Viscount Howe, and Lord Sydney."<sup>1</sup>

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<sup>1</sup> The printed papers of appeal contain the following strong representation of the hardship of the rule, as applied to the circumstances of this case:

"The appellants and intervener in support of their case, beg leave to observe, that as the facts stand now disclosed to your lordships, the single question arises, whether it was so unlawful for a British subject to send supplies to the British plantations in the Grenada islands, whilst under the misfortune of a temporary subjection to the French, as that a confiscation of the supplies so sent should be the just and legal consequences of his misconduct? and they humbly presume, that this question cannot possibly be answered in the affirmative by those who consider the favorable principles of the various acts of parliament, relating to the British captured islands, the attentions of his majesty's ministers to the relief of the proprietors, and the peculiar exigence of public affairs, which called both upon the legislature, and the executive government, to authorize special provisions for cases, which happily have had but few precedents in the history of this country.

"In the late unfortunate war, Great Britain saw many of its valuable West India possessions fall into the hands of the enemy from its absolute inability to protect them. The proprietors being still British in principle and affection, and many of them by actual residence, and the hope being constantly entertained, as well by the public as by individuals, that these islands would soon revert to the dominion of their natural sovereign, the parliament, in the several cases of Nevis, Montserrat, St. Christopher's, Grenada, and the Grenadines, expressly permitted the produce of those plantations to be conveyed to Europe, free from British capture, under limitations intended merely to prevent the abuse of this permission by the clandestine extension of it to the produce of foreign colonies. In this provision the principle appears to be clearly recognized and established, that these islands, though captured, were not to be considered as French; for upon what other principle could British protection have been imparted to them? and if the British legislature did thus solemnly declare its intention to protect and encourage the produce of those plantations during the remainder of the war, upon what grounds of legal or political analogy can it be contended that it was criminal to transmit those supplies, without which those plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of necessary importation, without which the pretended permission of the other is merely nugatory and insulting?

"The conduct of his majesty's executive government was no less favorable to the interests of the unfortunate British proprietors. Various applications to his majesty's ministers on the behalf of these proprietors were always readily entertained and attentively considered; and the appellants and intervener deem much too highly of the wisdom and integrity of his majesty's servants to suppose, that whilst they were listening to every proposal for the relief of those islands, they were at that moment conscious to themselves that in truth they were only consulting for the better security of the property of the French.

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[ \* 210 ] \* In The Eenigheid, Lords, 21st March, 1795, a case of a claim of Mr. Hankey of London and of Mr. Alphen of Rotterdam, for a quantity of corn shipped on board a Lubeck ship, in December, 1792, from Rotterdam to Nantes.

[ \* 211 ] \* It appeared from the evidence, that the ship was chartered for this voyage on the 6th of December, 1792, and that the cargo was actually laden in the same month, but by various accidental delays, the ship was prevented from putting to sea till the 9th of February. Hostilities were declared by the ruling powers of France against England and Holland, on the 1st of February, 1793.

It was contended for the captors, that hostilities having been declared by the ruling powers of France against England and Holland, on the 1st of February, 1793, no cargo could lawfully be sent from Holland for France, on account of British and Dutch subjects, on the 9th of the same month; subsequent to which, this ship, with the cargo of wheat in question on board, set sail from Helvoetsluys for Nantes; and having been captured in such voyage on the [ \* 212 ] 26th of \* that month, the cargo was rightly, justly, and lawfully condemned as prize to the British captors.

The sentence of the Court of Admiralty, condemning the whole cargo, was affirmed; <sup>1</sup> present, Earl of Mansfield, president of the council, Lord Auckland, Sir Richard Pepper Arden, Master of the Rolls, Sir J. Eyre, chief justice of the Common Pleas, Sir W. Wynne, Charles Greville, Esq.

In The Fortuna, Kock, Lords, 27th June, 1795, a case of a claim of Messrs. Tupper and Drake, British merchants, carrying on trade at Barcelona, for a quantity of wines shipped on board a Swedish vessel at Barcelona, January, 1793, and destined to Calais.

It appeared in evidence, that the ship was chartered for this voyage, on the 11th of January, 1793, that she sailed to Tarragona and Saloe, (in which latter port she arrived on the 15th of February,) and completed her cargo, and sailed on her voyage to Calais on the 21st

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" Upon the extreme exigence of public affairs at that period, the appellants and intervenor forbear to enlarge. It remains for your lordships to decide, whether these could possibly be the intentions of the British government, namely: That those islands should be condemned to absolute sterility by a refusal of such necessary supplies as the French, from a partiality for their own islands, found it convenient to withhold from them; that the only practicable mode for the immediate collection of British debts, secured upon those plantations to an enormous amount, should be prohibited and punished; and that Great Britain, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider its own, should be at the mercy of the ancient markets of the enemy upon such terms as a successful monopoly would prescribe."

[The Noyade, 4 C. Rob. 351.]

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of March. The ship was taken on the 8th of April, by a Spanish frigate, and released under this sentence of the Spanish Court of Admiralty, in these terms: "That considering the vessel is under neutral colors; that the cargo does not consist of contraband goods; that the concerned do not appear other than merchants resident in Spain; that the war was not declared against France, neither when she was laden or when she was detained, because it was on the 20th of March, and the last bill of lading appears dated at Saloe, on the 15th of the said month, from whence she sailed on the 21st, they ought and did command the said brig to be set at liberty."

For the captors it was contended, that the ship was liable to confiscation, because she sailed from Spain for Calais many months subsequent to the commencement \* of hostilities by [ \* 213 ] the French against this country and against Spain; and because it was incumbent on the proprietors to have prevented the sailing of this ship from Spain for Calais, or to have shown that every endeavor had been used for that purpose.

The sentence of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of Mansfield, Lord St. Helens, Sir W. Wynne, Sylvester Douglas, Esq.

In *The Freeden*, Lords, July 4, 1795, a case of a claim of Messrs. Herries, Keith, and Stembor, of Barcelona, merchants, for a quantity of brandies shipped on board a Swedish ship at different Spanish ports, in the months of March and April, 1793.

It appeared in evidence, that the firm consisted of Sir Robert Herries and Charles Herries, resident in London, Alexander Keith, a British subject resident at Barcelona, George Keith, a British subject resident at Ostend, and Frederick Stembor, a Dutch subject resident at Barcelona. The vessel was chartered on the 7th of March, for Ostend. On the 14th of March she sailed from Barcelona to Terrendembarra, and from thence on the 23d of March, for Terragona, where the cargo in question was completed; she sailed from thence on the 3d of April, and put into Malaga on the 6th of May; and proceeding on her voyage, was taken on the 2d of June by a French privateer, and retaken on the 23d by the respondents.

On the former hearing, leave was given to Sir Robert Herries, resident in London, to give proof that on the breaking out of hostilities they had taken means to prevent their being implicated in the consequences \* of an illicit commerce. A letter was accordingly brought in, written on the 12th of February, 1793, in which was this passage: "We have learnt with certainty the declaration of war in France against this country and Holland, as well as the actual commencement of hostilities by the capture of several

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of our trading vessels; in consequence of which letters of marque and general reprisals are granted here, against all ships and goods belonging to France, or to any persons, being subjects of France, or inhabiting within any of the territories of France."

The judgment of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of Mansfield, lord president of the council, Sir Richard Pepper Arden, Sir W. Wynne, Sylvester Douglas, and Charles Greville, Esqrs.

In *The William*, Lords, December 19th, 1795, a case of a claim of Messrs. Munro, Macfarlane, & Co. of Grenada, for a quantity of sugars shipped on their account at Guadaloupe, in June, 1793.

It appeared from the claimant's affidavit, that for some years prior to the war, a trade had been carried on by the merchants of the British islands, supplying the French islands with slaves, on credit, to receive payment in sugars of the ensuing year. That there was, on that account, always a considerable debt due to them from the French merchants. That the sugar in question had actually been received at Guadaloupe by the agent of the claimants, for slaves sold on their account prior to the war.

The judgment of the Vice Admiralty Court of St. Christopher, condemning the ship and cargo, was \* affirmed; <sup>1</sup> pre-

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<sup>1</sup> In this case, the extreme hardship of the rule contended for, was strongly urged by Dr. Nicholl, now King's Advocate, and Mr. Stephen, as applied to the situation of the present claimants. It was argued, that there were no other means of obtaining a remittance, as payment by produce was the usual mode of dealing as well in the English as the French islands; that they were too remote from the seat of government to obtain a license from England in time, and that there was no authority in the West Indies competent to dispense with the rule contended for; that to deny the claimant, this mode of getting off their effects, was to maintain that they were absolutely bound without any alternative, to leave them in the hands of the enemy; that this distinction arose between the present case and former precedents; that there was in this case no accommodation to the enemy, but rather an impoverishment, in taking out of their reach valuable articles for which no farther compensation was to be made; that it differed, therefore, from cases of exporting to the enemy's country, or of importing from thence for reciprocal profit; that the commercial treaty between Great Britain and France, allowed a month after the breaking out of hostilities for the removal of property from the enemy's country; that the present shipment was within that period after the time when notice of the war first arrived in those parts; and that if British subjects were not permitted by their own government to avail themselves of the favorable stipulation of the treaty, it became a snare rather than a protection to those, who were induced to engage in trade on the faith of it.

*For the captors.* All question respecting the property which had been contested in the court below, was given up by the then King's Advocate, Sir W. Scott; and the case was expressly placed on the ground, that the claimants being British or Dutch subjects, were taken in the act of trading with the enemy contrary to their allegiance. The case of *The Lady Jane*, in 1749, in which the produce of goods sold in the

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The Hoop. 1 C. Rob.

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sent, Earl of Mansfield, president of the council, Lord St. Helens, Sir Richard Pepper Arden, Master of the Rolls, and Sir W. Wynne.

I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established, that no one case exists which has been permitted to contravene it. For I take upon me to aver, that all cases of this kind which have come \* before that tribunal have received an uniform determination. [ \* 216 ] The cases which I have produced prove that the rule has been rigidly enforced. Where acts of parliament have on different occasions been made to relax the navigation law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claim not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; \* and that it has been enforced [ \* 217 ] not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England;<sup>1</sup> and he who for so long a time assisted at the decisions of that court, and at that period, could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess, prove him to have been personally present at those particular judgments. What is meant by the addition "but this does not extend to a neutral vessel," it is extremely difficult to conjecture,

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enemy's country before the truce, and that of The Juffrouw Margaretha, where wines left in store, and afterwards shipped in specie, were condemned, were relied on. It was expressly contended, that there was no difference between going to or coming from the enemy's ports, as they were equally acts of commercial intercourse with the enemy, which by the law of war was universally prohibited; that the power of the crown to dispense with this rule, in particular cases, was a sufficient answer to every objection, on the ground of hardship; and that the allowing of a commerce with the enemy, even for the specious purpose of withdrawing property without such previous license, would be opening a wide door for treasonable communications with the enemy.

<sup>1</sup> *Gist v. Mason*, 1 T. R. 85.

because no man was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation ; and, therefore, I cannot but conclude, that the words of that great person must have been received with some slight degree of misapprehension.

What the common law of England may be, it is not necessary, nor perhaps proper for me to inquire. But it is difficult to conceive that it can by any possibility be otherwise ; for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have [ \* 218 ] happened more frequently upon \* the water, merely in consequence of the insular situation of this country ; but when an enemy existed in the other part of the island, (the only instance in which it would occur upon the land,) it appears, from the case referred to by that noble person, to have been deemed equally criminal in the jurisprudence of this country.

The general rule of law being in my apprehension clear, it is only to be inquired, whether there are any distinctions which take this case out of the application ? And I need not add, that these must be legal distinctions, and not such as present mere considerations of indulgence and compassion, or mere considerations of the utility of the particular commerce ; for to these the court has no power to give way. A reference has been made to the statutes. It is not argued that the statutes will, in the just apprehension of them, authorize such a trade, but that they might have led to an innocent mistake on the subject. These statutes, it is admitted, were made to apply only to the property of persons in Holland, while hostilities were impending. It was necessary that some provisions should be made, for the security of the loyal Dutchmen who might migrate to this country. It was found necessary, on this account, to relax the navigation laws ; and for this purpose an order of council first issued, which was afterwards confirmed by these acts, as necessary to support the order and protect those who acted under it, but merely with respect to property so circumstanced. These were mere custom-house regulations, and nothing else ; and it is impossible to entertain a doubt respecting the interpretation of them.

[ \* 219 ] \* It appears that these parties had before applied to the council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information. Instead of doing so, they consulted the commissioners of the customs, very proper judges to ascertain what goods might be imported under the revenue laws. But this is a matter of



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The Hoop. 1 C. Rob.

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general law, on which they are not the persons best qualified to give information or advice.<sup>1</sup> The intention of the parties might be perfectly innocent, but there is still the fact against them of that actual contravention of the law, which no innocence of intention can do away. The same pleas were urged, and with equal reason, for Mr. Escott, and in many other cases. But it has been decided by a court which has much greater power of construction that such pleas could not be sustained. I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe. But the court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the claims.

Freight and expenses were given to the master.

On application that the court would decree the expenses of the claims to be paid out of the cargo, it was contended, that there was no instance in which the court had done this, but in cases of recapture.

The court directed the expenses to be paid.

January 10th, 1800. In *The Nelly*, Perrie, a case of a British subject trading with Holland without license. *Laurence* took an exception to the form of the condemnation; and submitted that \* it nowhere appeared that the individual [\* 220] captor was entitled to the benefit of such a seizure; that it was not given to him by the French nor by the Spanish prize act; \* that the Lords had reserved the question in *The Etrusco*, whether that part for which the claim of a British subject was rejected, should be condemned to the crown or to the captors; that the court might, perhaps, exercise the discretion of condemning to the crown, by which means the crown would be enabled to relieve, by its bounty, the hardships that often occurred in cases of this kind.

COURT. The same course of decisions, which has established that property of a British subject taken trading with the enemy, is forfeited, has decided also that it is forfeited as prize. The ground of the forfeiture is, that it is taken adhering to the enemy, and therefore the proprietor is *pro hac vice* to be considered as an enemy. It is impossible for me not to pronounce that this property is forfeited, and forfeited as prize. The illegality of trade in the case of *The Etrusco*, was of a different nature, that being a trade in violation of the charter of the East India Company.

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<sup>1</sup> [In *The Joseph*, 1 Gall. 545, the sanction of the minister of the United States at the port of starting, was held not to excuse for trading with the enemy.]

<sup>2</sup> Lords, December 8th, 1798.

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The Betty Cathcart. 1 C. Rob.

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THE BETTY CATHCART, Gillespie, master.

(In the Instance, or Civil Court of Admiralty.)

February 16, 1799.

A British vessel sailing without a British register from circumstances of necessity, decreed not to be forfeited under the navigation acts.<sup>1</sup>

THIS was a case of an appeal from a condemnation on the revenue laws.

## JUDGMENT.

SIR W. SCOTT. This is a proceeding on the revenue laws, brought by appeal from the Vice Admiralty Court of Jamaica, where this ship has been condemned to the crown, the governor, and seizor, [ \* 221 ] \* for being found sailing without a register. The proceedings are conducted by the private seizor only, who has unquestionably a right to sustain such a suit without any active concurrence of the two other parties.

The revenue and navigation laws, are certainly to be construed and applied with great exactness, they are framed for the security of great national interests ; and the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships. At the same time it is not to be said, that they are not subject to all considerations of rational equity. Cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or has acted, at least, for the best, must be considered in this system of laws, just as in other systems. Laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. The court, therefore, will not deem it a departure from the duty of legal interpretation in such cases, to give a fair attention to considerations of this nature.

The state of war is, in some degree, likewise to be considered as forcing men into situations which they did not choose for themselves,

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<sup>1</sup> [For other cases where laws were violated from necessity or distress, see *The William Gray*, 1 Paine, 16 ; *Brig James Wells v. The United States*, 7 Cranch, 22 ; *Brig Struggle v. The United States*, 9 Cranch, 71 ; *The New York*, 3 Wheat. 59 ; *The Æolus*, 3 Wheat. 392.]

and in which they must act under the pressure of difficulties on different sides.

The present case is, in its general appearance, of a favorable aspect; it has no symptom of fraud; there is no attempt to impose; this alone it is true would not be sufficient; for it certainly may happen that a *bond fide* case may incur the penalty of the law, and \* may become the victim of a general policy, anxious to [ \* 222 ] prevent the possibilities of fraud, and therefore active in prohibiting modes of dealing which are grossly liable to abuses of that kind, though the particular transaction may not be directly impeachable. It is favorable, too, in another respect, as it is the case of a neutral merchant standing forward and encountering risk for the protection of British interests. The ship had been a British vessel taken by the French and carried into an American port. The British consul interposed, and the subordinate court in America determined, in perfect consistence with the laws of neutrality, that it was a capture unlawfully made in violation of their particular neutrality, and restored the vessel. An appeal was prosecuted to the Superior Court, and it was agreed, to prevent the destruction of the vessel by its rotting in a harbor during the pendency of this appeal, that the ship should be sold and the proceeds should remain to abide the event of the ultimate adjudication. In this state the vessel was purchased by a Mr. Penman of Charlestown, according to his declaration, for the former owners, if they elected to take it; otherwise for Simpson and Davidson, British merchants, correspondents of his in London, in whose names and on whose account it was actually purchased. Mr. Penman then applied, by means of the British consul, who witnesses the whole of the transaction, to the French consul for the ship's register and other documents. The French consul refused. Application was made to the American court which had decreed the sale, to compel a delivery of the British papers, but the American court declined interfering to that effect, upon the application of the British consul, who certifies the fact, and puts his \* certificate [ \* 223 ] on board, stating what had passed, and that the "ship is and continues a British bottom, and that he does this for the security of British owners." The ship, thus deprived of her papers, sails with a British master and crew, and with a quantity of lumber on board, to Jamaica, for the purpose of joining the convoy that was to carry her and other vessels to Great Britain, where her owners lived. The ship was there seized for a breach of the revenue laws; a claim was given by Penman, for Hamilton and Gordon, the persons for whose use she was bought, and who have signified their acceptance of the purchase, but the claim was rejected and the vessel condemned.

The principal questions are two: first, Whether this vessel was not at this time to be considered as the property of Penman? and secondly, Whether, sailing without a register, she is not liable to condemnation, let her belong to whom she may?

The account given by Penman in his claim is, that being the correspondent of the original owners, and also the correspondent and confidential agent of Simpson and Davidson, he bought, not in his own name, but in the name of Simpson and Davidson, reserving, however, an option for the first proprietors. The principal document in proof thereof, is the certificate of the British consul, declaring that she was bought in the names of Simpson and Davidson, and for their use; but no mention is made of the former owners, for whose prior use Penman intended it, if they thought fit to accept; and the question that naturally occurs is, why, with this intention, he did not rather buy in their names. The explanations given are, that Penman was more connected with Simpson and Davidson than with the [ \* 224 ] others, and had \* a larger authority from them; and besides, that it was possible that the former owners might elect to abandon her to the insurers, which right he meant to preserve to them. These explanations are consistent, and account for the mode of conducting the transaction. That it was the intention of the party in buying this vessel to buy for British parties at all events, is strongly guaranteed by the circumstances that attended and followed the purchase. He purchases publicly in their names, with the knowledge of the consul; he applies immediately to the French consul for the British documents, and institutes a suit to compel the delivery. It is objected that the application ought to have been made to the Superior Court for this purpose; and, strictly speaking, it ought; but the British consul seems to have thought otherwise, and to have deemed the refusal on the part of the court which decreed the sale to be fully sufficient. And, indeed, when it is considered that the French consul declared it to be his determination to send these papers to France, for the use of the tribunals there, it is no wonder that an attempt to obtain them by the authority of the Superior Court in America was abandoned. Another circumstance, tending strongly to support the reality of the transaction, is, that he sends this vessel immediately to a British port, consigned to British merchants there, with express orders to send her on to Great Britain under the convoy; and the ship immediately on her arrival in Jamaica, is declared at the custom-house to be in the circumstances described. Upon the view of all these facts, I cannot but think it would be hard to bind [ \* 225 ] down this property upon the American merchant, \* who made the purchase for the benefit of British interests, merely

to expose him to the penalty, which, under our revenue laws, would attach upon an American vessel carrying any goods to Jamaica.

It is objected, that whatever the vessel was in the intention of the parties, she was nevertheless, in fact, American, because it did not appear that Penman had an authority from Simpson and Davidson to buy, and therefore that they might have declined accepting her. He describes himself as their correspondent, confidential friend, and agent, and the consul describes him as their agent; and when it is considered that he sends this ship to a British port, with a full disclosure of all circumstances, it must be presumed that he conceived himself to possess a competent authority, and that he actually was in possession of a sufficient authority. To support such an intention, the court would be inclined to presume every thing in the fact, as well as in the apprehension of the party, that was not directly contradicted by the evidence.

The next consideration is, whether she would not be liable for sailing without a register, even supposing she was British. In fact she has no one document but the certificate of the consul, stating the circumstances of the case, and declaring her to be a British vessel. And, unquestionably, a ship unprovided with all documents, and particularly with a British certificate of registry, would be liable to condemnation, unless the occasion of this defect of documents was such as to afford a reasonable ground of exception to the general operation of the revenue laws. When I describe the present case to have originated in the accidents of war, and the conduct of the parties to \*have been controlled by an unavoidable necessity, I [\* 226] think I describe a case that furnishes a solid ground of that nature. The ship is carried in as prize, the documents are all taken away, the American merchant steps forward for the British interests, he purchases the vessel for them, he applies for the documents and invokes the aid of justice to obtain them, but without effect. What was he to do? He had only the choice of two measures: to keep her in port till other documents could be procured from Europe, or send her on to Europe without documents, but with papers properly authenticated, explanatory of her real situation. In these circumstances she is directed to sail, a British-built vessel, purchased for British owners, and navigated according to law in all respects, but in the want of these documents, which could not be procured. It is objected, that she is not despatched immediately to Great Britain, the country of her owners, but to Jamaica. She goes there, however, for the purpose of coming under convoy to Great Britain, and I do not think that the rule which requires that a ship, which has lost her certificate shall go direct to the country of her owners, excludes a reasonable

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The Rebeckah. 1 C. Rob.

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attention to the security of that voyage. It is objected, that she had a cargo of lumber on board; but I am not acquainted with any case in which the rule has been laid down, that a British ship, going upon an occasion of this kind, must go in ballast, and must not carry any goods on board.

I am to add to all these considerations, that the foreign merchant in this case will be the sufferer, if the condemnation is sustained. The original owners will be secured by the proceeds of sale re- [ \* 227 ] maining in the \* American court. Looking to the motives under which the American merchant acted, and to the authority by which his conduct was directed, and making some allowance for ignorance of British law, I think it reasonable to be content with less circumspection and less regularity than might be required from other parties and under other circumstances. I shall therefore reverse the sentence; but as the case is not without its legal difficulties, I shall certainly give no costs against the seizor, who had a full right to take the opinion of the court.

July 1st, 1800, on appeal before his majesty's High Court of Delegates, this sentence was affirmed.

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THE REBECKAH, Thompson, master.

February 26, 1799.

A capture made by the crews of king's ship stationed at the island of St. Marcou, adjudged to be not a droit of admiralty, but prize to the actual captor.<sup>1</sup>

THIS was a question of interest on the capture of a vessel made

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<sup>1</sup> [Decisions as to what are Droits of Admiralty: The Maria Francoise, 6 C. Rob. 282; The Gertruyda, 2 C. Rob. 211; La Esperanza, 1 Hagg. Ad. R. 86; The Abigail, 4 C. Rob. 72; The Melomane, 5 C. Rob. 41; The Zepherina, 2 Hagg. Ad. R. 320; 2 C. Rob. n.; The Charlotte, 5 C. Rob. 280; The Aquila, 1 C. Rob. 429 and note; King v. Property Derelict, 1 Hagg. Ad. R. 383; The Santa Cruz, 1 C. Rob. 76; La Rosine, 2 C. Rob. 372; The Orion, 1 Acton. 205; The Feltina, 1 Dod. 450, and 2 Hagg. Ad. R. 438; The Marianna, 3 Hagg. Ad. R. 208; King v. Two casks, &c. 3 Hagg. Ad. R. 294; The Joseph, 1 Gall. 558; The Panda, 1 W. Rob. 423; The Ackenson, 1 Hay. & Marriot, 1. The whole subject is now regulated in England, by stat. 9 & 10 Vict. ch. 99; The Little Joe, 1 Stew. R. 394.]

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The Rebeckah. 1 C. Rob.

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from the island of St. Marcou, whether it should be condemned as a droit of admiralty or to the captor.

For the admiralty, the *Advocate of the Admiralty* and *Laurence*. The circumstances of the capture are: That this vessel, on putting into St. Marcou for safety, was fired at from the fort, and immediately struck her colors; that she continued to ride there a whole day before possession was taken; that it was at last taken by a boat's crew coming off from the fort.

These facts it is presumed, are sufficient to establish the claim of the admiralty, as the law gives the benefit of all captures made in roadsteads, creeks, or havens, and on anchorage ground, to the lord high admiral, as his *peculium*.

\* The case of *The Trautmansdorff*,<sup>1</sup> in which the Lords decided against the claims of the admiralty, differs materially from the present, as that capture was made in the open sea, off the bold shore of St. Helena. It was, besides, doubtful in what manner possession was first taken; whether by a boat from the *Powerful*, or by the act of firing a shot from the fort. In this case it is not disputed that the surrender was made to the fort long before any boat went off to take possession. In a case of a capture made by the garrison of Gibraltar, *The Nostra Signora del Carmen*,<sup>2</sup> it was condemned as a droit of admiralty. In this case it is an additional circumstance in favor of the claim of the admiralty, that the island of St. Marcou is certified to be peculiarly under the direction of the admiralty. On these grounds, it is submitted, the prize is to be condemned as a droit of admiralty.

For the captors, the *King's Advocate*, and *Arnold*. In this case there had been a mistake in praying condemnation to the crown; but it has been rectified, and the individual captors are now the parties before the court. Against either, the admiralty can have no claim. The capture was made by naval officers, in their naval character — and therefore, *primâ facie*, it is acquired to the king, and through him to the actual captors. The proof therefore must lie with the admiralty to take this case out of the general \*rule. [\* 229] But the asserted facts are not established by the evi-

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<sup>1</sup> Lords, Aug. 1, 1795.

<sup>2</sup> *The Nostra Signora del Carmen*, Bregnante, master, laden with wine and oil, seized in the harbor of Gibraltar, by order of Colonel Roger Elliot, lieutenant-governor; "ship and cargo condemned to the lord high admiral as perquisites of admiralty." Adm. June 25, 1708.

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dence. It is by no means proved that the vessel was at anchor at the time of capture, as it is rather intimated, by the expressions of the witnesses, that she struck her colors before she came to an anchor. If there was, however, proof of that fact, it by no means follows that this capture would be to be considered as a droit of admiralty. There is no pretence to say that the place of capture was a port or haven; it is merely a strait running between the island and the French coast; is rather an anchorage-ground off the island of St. Marcou, than a port or haven within its limits. By the decision of The Trautmansdorff it is clearly settled, that an intention to come in is not sufficient; there must be an actual coming in to support the claim of the admiralty. No such thing is proved in this case, and, therefore, the condemnation must pass in favor of the actual captors.

#### JUDGMENT.

SIR W. SCOTT. The general question arises upon the capture of a vessel at the isle of Marcou, effected with considerable exertions of gallantry and perseverance by the crews of the Sand-Fly and Badger, stationed in and near that little island — and it is a question of interest between the lord high admiral, or, as in modern times it is more usually expressed, the king in his office of admiralty, representing that great officer, and the naval captors standing upon the general claim of prize, under the proclamation and the prize acts of parliament.

The rights of the lord high admiral are of great antiquity and splendor; and are entitled to great attention and respect; and certainly to full as much in this court as in any other place where [ \* 230 ] they can possibly \* come under consideration. At the same time, it is not to be understood that an extension of these rights beyond their absolute limits is to be favored by construction; they are parts and parcels of the ancient rights of the crown communicated by former grants to that great officer, under a very different state and administration of his office from that which now exists in practice.

All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments, are diminished by any grant, beyond what such grant, by necessary and unavoidable construction,



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shall take away.<sup>1</sup> It is not improper for me to add, that the particular circumstances of the present case, which imply great merit of active exertion on the part of the captors, would certainly not dispose the court to lose sight of this general rule in considering this question of interest.

The grant to the lord high admiral (evidenced as it is by the orders in council of 1665,<sup>2</sup> and by the \*subsisting practice,) gives him the benefit of all captures by whomsoever made, whether commissioned \*or non-commissioned persons, under certain circumstances of situation and locality — that is, “of all ships and goods coming into ports, creeks, or roads of England or Ireland, unless they come in voluntarily upon revolt, or are driven in by the king’s cruisers.” Usage hath construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging. But I can by no means agree to the posi-

<sup>1</sup> [The *Maria Francoise*, 6 C. Rob. 282, 297; The *Panda*, 1 W. Rob. 423, 436.]

<sup>2</sup> The following is a correct copy of those orders. At a council held at Worcester-house, the 6th of March, 1665-6:

PRESENT. — The King’s most Excellent Majesty; His Royal Highness the Duke of York; His Highness, Prince Rupert; Lord Chancellor; Duke of Albemarle; Earl of Lauderdale; Lord Fitzharding; Lord Arlington; Lord Berkeley; Lord Ashley; Mr. Secretary Morice; Sir William Coventry.

Whereas through the long intermission of any war at sea by his majesty’s authority, several doubts have arisen concerning certain rights of the lord high admiral in time of hostility, the determination whereof appearing very necessary for the direction, as well of his majesty’s officers as of those of the lord high admiral; upon full hearing and debate of the particulars hereafter mentioned, the king’s counsel, learned in the common law, and likewise the judge of the High Court of Admiralty, and those of his majesty’s and his royal highness the lord high admiral’s counsel in the said High Court of Admiralty, being present, his majesty present in council, was pleased to declare:

1st. That all ships and goods belonging to enemies, coming into any port, creek, or road, of this his majesty’s kingdom of England or of Ireland, by stress of weather or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the lord high admiral; but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven in, and forced into port by the king’s men of war, and also such ships as shall be seized in any of the ports, creeks, or roads, of this kingdom, or of Ireland, before any declaration of war or reprisals by his majesty, do belong unto his majesty.

2d. That all enemies’ ships and goods casually met at sea, and seized by any vessel not commissioned, do belong to the lord high admiral.

3d. That salvage belongs to the lord high admiral for all ships rescued.

4th. That all ships forsaken by the company belonging to them are the lord high admiral’s, unless a ship commissioned have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissioned, then in the same company, and in pursuit of the enemy; and the like is to be understood of any goods thrown out of any ship pursued.<sup>3</sup>

<sup>3</sup> [Another copy will be found, 1 Hay. & Marriot, 50.]

tion that has been laid down, that wherever a ship can find anchorage-ground, there is a road or roadstead within the meaning of this grant. For if that were so, the lord high admiral would be entitled to all captures made within a moderate distance of most parts of the coasts of England and Ireland, and the foreign dominions belonging to them, which, assuredly, is not the case; for who would say, that if a ship at anchor in the channel of Dover is seized by a commissioned cruiser, the admiral is entitled? Every anchorage-ground is not a roadstead — a roadstead is a known general station for ships, *statio tutissima nautis*, notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself.

The very expression of “coming into a road” shows, that [ \* 233 ] by \*road is meant something much beyond mere anchorage-ground on an open coast. When it was laid down in *The Trautmansdorff*, that it was not necessary that the ship should be actually entered, and that it was enough if she was *in ipsis faucibus* of the port, creek, or road, it is evident that the words, ports, creeks, or roads, have a signification intimating certain known receptacles of ships, more or less protected by points and headlands, and marked out by limits, and resorted to as places of safety.

How far *St. Marcou* has a road that will at all satisfy this description, may be questioned. The witnesses talk of a road, it is true; but it should seem that these small and barren rocks inclose no portion of the sea, that can be strictly so considered. It is a pretty open strait running between them and the coast of France, where ships may ride as they may do in other open parts of the French coast. It might likewise admit of a question, how far such a mere naval station, without inhabitants, and without government, either civil or military, as in truth it is, and merely occupied for the temporary convenience of these gun-vessels and their crews, is so far a recognized possession of the crown of England as to come within the intention of the grant, which, according to the letter and my apprehension of its meaning, cannot travel beyond the ports, creeks, and roads of England and Ireland, and the dominions thereunto belonging.

Laying these questions, however, out of the case, the first question that will occur applies to the time of the capture, whether that is to be dated from the actual taking possession, or the previous [ \* 234 ] striking of the colors; and I think that the striking of the \*colors is to be deemed the real *deditio*. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered. But as that attempt failed, I am of opinion that the act of formal submission having never been effectively discontinued, must be deemed the

consummation of the capture ; and, if so, the next question will be, where the vessel was at the time that this act took place ? And this is proved to have been, "when she was about to go into the road to anchor there ;" for such is the expression of the witness upon the third interrogatory,<sup>1</sup> which points more immediately to the place of capture, although on the twenty-ninth, which is pointed only to the general course of the vessel upon her voyage, he says, "she put into the road there." The second witness describes her merely as "passing by the Isle of Marcou at the time ;" and the third says, in the language of the first, that "she was about to go into the road to anchor there." Clearly, by all their descriptions, she had not entered the road, and she was under sail at the time she struck her colors. In point of locality, then, the claim of the admiral is not founded, for she was not *in ipsis faucibus* ; she was about to enter, but was not actually entering, and that is the point at which the admiralty right commences.

The claim, therefore, of the admiralty must be supported, if at all, upon the other ground, namely, that \*this was [ \* 235 ] a capture made from the land, and by a land force, and therefore not a maritime capture, by persons commissioned to take for their own benefit ; and I think it is proved that the striking of the colors was compelled by a firing from the shore, and that a boat was sent from thence to take possession. Now upon this subject I entirely accede to what has been laid down, that a capture at sea, made by a force upon the land, (which is a case certainly possible, though not frequent,) is considered generally as a non-commissioned capture, and enures to the benefit of the lord high-admiral. Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize-interest under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority ; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorizing them to take upon that element for their own benefit. I likewise think cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty and not

<sup>1</sup> Under an intimation that it would be convenient to the reader to be able to turn to the interrogatories, to which the discussion of evidence frequently refers, the editor has annexed a copy of them in the Appendix.

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The Rebeckah. 1 C. Rob.

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themselves, by a capture made upon the sea by the use of a force stationed upon the land. Suppose the crew, or part of the crew of a man-of-war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon [ \* 236 ] the shore, such as may be met with in many parts of \*the coast, and, by means of such battery or fort, compelled such a ship to strike; I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty, and nothing more; and therefore I do not think it quite enough to say that the persons here were naval commissioned persons, and consequently entitled to the benefit of all property taken upon the sea. But I think that the peculiar nature and quality of the place where the capture was effected is to be added to the consideration. What is St. Marcou? It is styled a garrison and a fort by one or two witnesses, but inaccurately; for it is certified by the commander-in-chief that there is no garrison, nor any military establishment whatever. It is a mere naval station, used for the temporary accommodation of the crews of these ships of war. There is not a person upon it who is not borne upon the ship's books, and who is not a part of their crews. They have the ship's pay, the ship's victuals, and the ship's officers to command them; the block-houses which they have constructed are mounted with their own ship-guns, with the addition of a few spare guns otherwise procured. The whole force, such as it is, upon this little spot, is entirely subservient to these vessels, and for their use, and for no other purpose, as the certificates declare. Such a place, so selected and so employed, is hardly to be considered as any thing else than as a part or appendage of the naval force; it is a sort of stationary tender, rather attached to and dependent upon these vessels, than having the vessels at- [ \* 237 ] tached to and dependent upon it. This peculiar \*character of the place distinguishes it most essentially from the case of a land fortress possessed by a military garrison. The capture, then, was effected by naval commissioned persons, using a force immediately subject to their use; and, from its peculiar circumstances, sufficiently naval in itself to be distinguished from an ordinary land force, subject to military persons. It is a maritime capture, effected regularly by a maritime force, and in a spot where the right of the admiralty had not yet commenced upon the thing itself at the time of the surrender. And upon these grounds I shall pronounce for the claim of prize, under the king's proclamation and the prize acts.

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The Sarah Christina. 1 C. Rob.

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THE SARAH CHRISTINA, Gorgensen, master.

March 6, 1799.

Presumption of contraband articles substituted, in certain cases, in the place of confiscation, by the modern law of nations.

Strict good faith required; a false destination fraudulent; condemnation.<sup>1</sup>

THIS was a case of a Swedish vessel going to France with contraband articles, and sailing under a colorable destination to a neutral port.

JUDGMENT.

SIR W. SCOTT. This is a case of a Swedish ship laden with tar, pitch, iron hoops and bars, and bound ostensibly to Cagliari.

The ship and cargo are claimed for the same person. The ship appears clearly to be Swedish property. But there are considerable doubts on the property of the cargo. The master swears "the claimant is the lader, and he believes the owner;" a very  
 \* diffident manner, surely, of verifying the property of a cargo [ \* 238 ] which is asserted to belong to his own owner. Amongst the papers which describe the property there is a charter-party as formal as any can be. It may, perhaps, not be uncommon for a person owning both ship and cargo to have something of a charter-party, for the purpose of keeping distinct accounts of the respective profits of his ship and of his cargo; but why such stipulations should be introduced into a contract between a man and himself, as are to be found in this instrument; why a sworn broker should intervene for the drawing of this contract, and a magistrate who is to authenticate the signature of this broker, is not so easy to explain. Certainly the mere purpose of a man's keeping his own private accounts does not in any degree explain it. I observe, too, that the freight is to be paid at the port of delivery, by the person to whom the cargo is to be delivered; rather an unusual condition of a contract executed merely for the purpose of keeping accounts, which are to be finally settled by the individual himself. This charter-party and manifest are both signed by this broker; and I observe that the broker's name is the same with that of the French vice-consul, who attests some of these documents. Such a circumstance, though much too slight to lead to any conclusion, yet, connected with the other circumstances, may suggest something of a presumption that

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<sup>1</sup> [The Franklin, 3 C. Rob. 217 and note.]

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French interests might be concerned here, particularly if it turns out that the real destination of this cargo was to France.

If the cargo had been really going to Cagliari, although [ \*239 ] it was the property of Mr. Kock, the French \*consul, yet

being, as to his mercantile character, a trader of Udivalla, and his mercantile character being unaffected by his consular character, he would have a clear right to trade to the same extent as any other merchant of that place, and consequently to carry pitch and tar to a neutral port. But the neutral destination, which is held forth in all the papers, is discredited by the fact of her being taken going into Cherbourg; to say nothing of the provisional instructions which are elaborately framed for the case of her being carried into any belligerent port. The master is empowered, in that case, to sell the whole of his cargo; he is even to offer it to the government for sale; in short, the event of her delivering her cargo in a belligerent port is as minutely provided for as if no other port had ever been in the contemplation of the parties. The great fact, however, is, that she was going into Cherbourg; and the explanation given by the master is, "that she was obliged to put into that port for water." The experience of this court has not taught it much respect to such explanations generally; and the circumstances of the present case rather fortify the result of that experience. Two circumstances in particular weigh much with me: the ship had left her port of Udivalla on the 8th of November, and she is seized on the 17th of the same month. She had, therefore, been only nine days from her port of clearance when this necessity arising from the failure of water commences. Now, that a ship meaning *bonâ fide* to go from Udivalla, in Sweden, to one of the southernmost points of Europe, should either not lay in more water than was sufficient for nine

[ \*240 ] day's use, or should not secure that \*water in a sufficient manner relatively to the length of such a voyage, is highly improbable. The master says he took in eighteen casks at Udivalla, and six were emptied by use and leakage, and that some of the remainder were leaky; and the mate echoes him to a letter; but the boatswain knows nothing of the matter, for he swears "that the course was altered to go into Cherbourg, but he can give no account why it was so altered." And this is the second circumstance I allude to; for it is most extraordinary that such a necessity as is pretended should exist on board this ship, and yet be unknown to the crew. They were all engaged to go to Cagliari; an extreme failure of their stock of water compels them to go into a French port. Is it possible to conceive that such a change of the voyage should take place upon such compulsion, and yet that the cause should be so

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totally a secret, locked up within the possession of the master and mate, as not to be known to this man, who was a sort of officer on board this vessel?

It is said, that if the truth of this account is doubted there might have been a commission of inspection. But what would that prove? If there was a fraud intended, it would be natural for the parties to take care that the state of the casks should not detect it. They would be emptied, of course. Therefore this could have given no satisfaction; nor are there any means by which it could be satisfactorily proved that there was no fraud. To me the fraud appears sufficiently demonstrated by all the circumstances; and I desire neutral masters to take notice, that where a fact of deviation into an enemy's port is clearly proved, it will be no easy thing to purge away that fact by explanation; for, in the nature of [\* 241] the thing, the explanation must generally come from themselves only; and, coming from themselves alone, comes from a quarter exposed to suspicion, arising from the fact itself. The general inclination of the court will therefore be, (though subject to reasonable exception,) to take the clear fact against the dubious explanation.

I consider this, then, as the case of a Swedish ship carrying pitch and tar to a French port, under a pretended neutral destination. What will be the effect of such conduct? Pitch and tar are now become generally contraband in a maritime war; they have been condemned as such by the highest authority in this country.<sup>1</sup> In the practice of this court there is a relaxation which allows the carrying of these articles, being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce.<sup>2</sup> But in the same practice this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for preëmption;<sup>3</sup> no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility. To entitle the party to the benefit of this rule, a perfect *bond fides* on his part is required.

It is asked why should a real destination to French ports be concealed, if the neutral has a right to carry these avowedly? Clearly

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<sup>1</sup> [See note to *The Maria*, 1 C. Rob. 372.]

<sup>2</sup> [See note to *The Apollo*, 4 C. Rob. 158.]

<sup>3</sup> [See *The Haabet*, 3 C. Rob. 174.]

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to give the French market a greater security. If pitch and [ \*242 ] tar are going, avowedly, \*to the enemy, they may be brought in for preëmption; but if papers holding out a neutral destination are put on board, this right is eluded, and the enemy is commodiously and securely provided with the instruments of war. The cruiser can only examine to satisfy himself of the fact of the destination; but he cannot detain without a responsibility in damages. The false representation, therefore, is not useless for the purposes of mischief; it is the passport and convoy for noxious articles to the ports of the enemy.

I am of opinion, then, that this cargo, consisting of some articles contraband in their own nature and going to the enemy's port, under a total absence of that fair conduct which ought to have been maintained in order to entitle it to the benefit of the more favorable rule, is subject to condemnation. With respect to the ship, if I was satisfied that the ship and cargo belonged to the same person I must condemn that also, upon the ordinary rule, which extends the penalty of contraband to all the property of the same owner, involved in the same unlawful transaction.<sup>1</sup> But I shall restore it, under the strong doubts which I entertain whether the cargo is not, in fact, the property of other persons, I mean French agents; for I suspect it, on the grounds mentioned above, to have been a French speculation throughout. In giving the owner of the ship any benefit from these doubts, I am, perhaps, practising a lenity which would require more apology than, upon strict principle, I might find easy to furnish; but I shall content myself with the restitution of the ship, withholding, as usual on the carriage of contraband, the allowance of freight and expenses.

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[ \*243 ] THE JONGE JACOBUS BAUMANN, Muller, master.

March 8, 1799.

A claim of capture by persons coming on board in distress rejected; <sup>2</sup> freight, expenses, and demurrage given to the ship.

THIS was a case of a ship proceeded against as prize, by persons taken on board from a stranded vessel.

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<sup>1</sup> [See note to The Ringende Jacob, 1 C. Rob. 91.]

<sup>2</sup> [The Charlotte, 1 Dod. 220.]



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The Jonge Jacobus Baumann. 1 C. Rob.

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## JUDGMENT.

SIR W. SCOTT. This is a case of a particular nature, arising, principally, on the affidavit of a neutral master. I shall therefore first consider the affidavit.

He states "that he was master of the ship Jonge Jacobus Baumann, at the time of the seizure; that the ship was laden at Leboure, in France, in the month of November last, with a cargo consisting of eight hundred and fifteen hogsheads of wine, to be delivered at Ham-burgh; that upon the morning of the 7th of January last the said ship was boarded by an officer and several men belonging to the Apollo frigate, then stranded and in distress, who told him that he must go down to the assistance of the frigate."

It does not appear from this affidavit that the man made any objection, or was backward in giving this assistance; nothing like it. On the contrary, he went down unsuspectingly and took the whole of the crew, to the number of one hundred and seventy or one hundred and eighty men on board. After they came on board, it seems, they started between two and three hundred hogsheads of wine into the sea; such an event might take place, under the particular circumstances of their situation, without much blame being imputed to them. The master farther states "that the captors likewise threw overboard sundry goods stowed in the cabin, and [\* 244] divers articles belonging to the ship; and, on his remonstrating against such conduct, he was repeatedly assured by the officers of the frigate that full satisfaction would be made to him by the British government." It does not appear that he objected to the removal of the wine, but he did remonstrate against the goods being removed out of the cabin; and he seems to have acquiesced under the assurance which he received from the officers, that compensation should be made him. I should not impute much blame to the captors for this act, nor to the master for his remonstrance; the captors might think it necessary to have the goods removed, but the master might not feel the necessity, or he might make this sort of remonstrance for the purpose of receiving those assurances which were afterwards given to him. It was not unnatural that such a man should feel some uneasiness at the loss of his cabin-stores; and till he was assured that compensation was to be made to him, it was fit that he should express it. The ship arrived at Yarmouth upon the 10th of January; and it appears that during the passage from the frigate to Yarmouth she was navigated by the master himself and his own crew, except that the pilot belonging to the frigate conducted her through the banks of Yarmouth. On the 10th and 11th of January the crew of the frigate left the ship, and went, some on

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shore, and others on board his Majesty's ships lying at Yarmouth. He states "that the papers were then demanded from him, and he was directed to go to a Mr. Stewart of that place."

Now supposing this account to be true, I cannot but [ \* 245 ] think that this was a service of the highest \*importance; in truth, not much short of a high salvage service. An assistance was given, which, whether voluntary or not, was the actual means of restoring one hundred and seventy or one hundred and eighty officers and men to this country. The parties who conferred this benefit are surely entitled to be liberally considered by those who received it. Who are the parties who conferred it? Clearly the master, because he was immediately concerned in the transaction; and I think, likewise, the owner, whose vessel was the instrument of preservation. With respect to the owners of the cargo, I cannot see what special claim they would have. Their property is not at all concerned in the preservation of the crew so taken up; and if it turns out to be enemy's property, there is no reason why that may not be condemned. I therefore think this suit has been not improperly instituted; but if the ship had really belonged to an enemy, in my opinion the character of enemy itself must have been blotted out and obliterated by such a service as this. If I was compelled to condemn this ship, it would be a most reluctant condemnation indeed. I hope and trust that if the circumstances are true, as stated by the master, a condemnation of the vessel would be the very last thing to present itself to the expectation of the asserted captors.

This being the case, then, upon the statement of the master, it remains only to inquire into the fact, whether it is true or not; for if this account is fictitious, then all these encomiums which I have passed upon it are entirely thrown away. Now I observe there are no affidavits brought in on the part of the captors to show [ \* 246 ] to me that this is not a fair \*representation. They might have produced them; but I do not understand that there has been any application made to the court for leave to exhibit affidavits on their part, in order to contradict what the master has deposed. It stands therefore uncontradicted by the captors; and till this moment no attempt has been made to impeach the truth of the master's representation. If it is contradicted at all, it is said to be contradicted by his own deposition, for that he has deposed to a fact of capture on the high seas, whilst all that he has said beyond that is a mere fable, as he was taken in the ordinary course of prize.

But I cannot accede to this representation. It is true, that upon the third interrogatory he says, in the usual words "that he was taken

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The Jonge Jacobus Baumann. 1 C. Rob.

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and seized upon the high seas, on suspicion of having French property on board, and that he was taken by the Apollo frigate." But this I understand to be little more than the formal answer to the interrogatory, as usually taken by the examiner; describing in a sort of general way, the ship whose crew took possession of him, and the time when that possession was taken; but not excluding these particular circumstances, which stand uncontradicted on his affidavit. There it appears that the true reason of their coming on board was the immediate preservation of their lives, and that they never thought of demanding his papers in quality of captors till they had got safe into Yarmouth. Nobody, at this time, ventures to deny that the situation of The Apollo was what he describes it; and if so, it is not to be taken literally that a stranded ship went a capturing; and I will add, that it is not a very probable thing that the \*crew of [ \* 247 ] such a ship should apply to any other vessel, with any other original purpose than to obtain assistance. The assistance was given. Upon the 25th interrogatory he expressly mentions, "that the wine and other goods were thrown overboard, about a mile from the Haak Sands, for the purpose of enabling them to take on board the crew of his Majesty's frigate The Apollo, which was then upon a sand." I can entertain no doubt of this account. The mere fact of one hundred and seventy or one hundred and eighty men coming on board, and remaining, is a proof that they came for another purpose than that of making prize of this merchantman.

An offer has since been made by the captors to release this ship; but the offer was clogged with a reservation of freight and expenses, and the poor man's private adventure, and therefore could not be accepted. It turns out that the agent for the captors afterwards brought in papers relating to the private adventure, which had been delivered up some time before by the master. Why were these papers not brought in immediately by the agent? They were very erroneously kept back. Agents must understand that they have no right to keep back papers in their own private possession. The inconvenience of failing in this duty is manifested in the present case; for as soon as ever these papers were brought in, a restitution of the private adventure was immediately offered.

Another fact of a similar kind requires some observation from me. The master, upon his examination, brought in a paper which the interpreter refused to accept, saying it was of no consequence. What right had the interpreter to say that? What were the commissioners and actuary about, when they permitted it to be said? It \*happens that the paper is of no special importance; but [ \* 248 ] every ship's paper is of importance; and the commissioners are bound to receive it.

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Upon the whole, I think there does appear great merit upon the part of this master, with respect to the preservation of so many lives of his Majesty's officers and crew; and I am of opinion that the court is bound to act as liberally as it can. I shall restore the ship, and I shall give the freight and expenses, and private adventure, and a reasonable demurrage during the time the vessel has been detained; and I desire that these may all be estimated by the registrar and merchants in the most favorable manner.

*May 30, 1800.* Farther proof being made of the cargo, it was ordered to be restored.

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THE ODIN, Hals, master.

March 15, 1799.

A British ship, ostensibly transferred to a Dane, taken trading with the enemy, condemned with her cargo, involved in the same claim.<sup>1</sup>

THIS was a case of a ship ostensibly transferred from a British subject to a Dane, and taken trading with the enemy.

JUDGMENT.

SIR W. SCOTT. This is a case of very considerable property; the ship and cargo, both of which are involved, being described to be of the value of 150,000*l.* Being of this value, it is of course a case of proportionable importance, and I feel the caution with which a judicial determination upon interests of such an extent ought to be framed and delivered. At the same time it is unnecessary to observe, that the *quantum* of the property can have no influence upon [ \* 249 ] the legal merits of the \* questions which I have to examine; the same principles apply to a case of 150*l.* (all other circumstances being equal,) which must be applied to this case of 150,000*l.*; and the same general duty lies upon the court to proceed with all the tenderness which is due to property, however small, and with all the firmness which it is bound to exercise, be the property ever so large.

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<sup>1</sup> [For a reference to other transfers found fraudulent, see note to *The Endraught*, 1 C. Rob. 22.]

The claim given is for the ship and cargo, as the property of Mr. Jacob Kresting, described to be a Norwegian by birth, resident and carrying on his business at Fredericksnagore, a Danish establishment, near Calcutta, in which he is second in council. It appears that the ship went with a cargo from the river Hughley to Batavia; part of that cargo she disposed of there, and took another cargo destined to Copenhagen; and in the prosecution of her voyage was seized and taken by a British ship of war. And if this had been the whole of the case, the consequence must have been an immediate restitution; because this court has not taken upon itself to lay down, that a Danish merchant at Fredericksnagore, a Danish settlement, may not send a cargo of his own, in his own ship, to Batavia, there dispose of that cargo and purchase another, and bring it to his own country in Europe. But a fact appears in the case, a fundamental fact, which gives rise to the whole of the present inquiry, namely, that this ship had been, a very short time before this voyage, the property of Messrs. Lambert and Ross, British subjects, residing at Calcutta. This fact leads to the question, whether this ship had been actually and *bona fide* transferred from them to this Danish merchant? For if not, if she continued \* the property of these British mer- [\* 250 ] chants, going on their commercial errands to Batavia, then a port of the public enemies of his majesty, she is going illegally, and illegally, so as to subject her to confiscation; there being no maxim better or more firmly established, in the maritime law of this country, than this, that no subject of the king can trade directly with the public enemy, but under a license authorizing him so to do; and that if he does presume to trade otherwise, his property, so employed, is liable to confiscation.<sup>1</sup> If this should turn out to be the case respecting the ship, it will dispose of all British interest in her. The cargo, it is to be observed, is claimed for the same person, and in the same claim. If the claim is deemed fraudulent, as it respects the property of the ship, it will, I think, be entitled to little regard as it respects the property of the cargo, claimed for the same proprietor, and appearing evidently, to be concerned in one and the same original adventure. I am not aware of the obligation that lies upon the court, in the case of such a claim, to separate its sound from its diseased parts, for the benefit of a claimant detected in the falsehood of a considerable portion of his claim. He has no right to insist that a discrimination shall be made in the property, which, if any part be his own, he has fraudulently and with corrupt views mixed up with the property of others. But in this particular case, it does not rest upon that general principle, because much

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<sup>1</sup> Vide *supra*. The Hoop, p. 196.

of the evidence (at least arising from general circumstances) which applies to the property of the ship, applies with equal force to that of the cargo.

It is not to be denied that the ship had been very recently [ \* 251 ] the property of these British merchants, navigated \* by John

Elmore ; but there is a bill of sale regularly executed under their hands, by which she is transferred to Mr. Kresting ; and the benefit of the general presumption has been claimed for this transfer, that every act must be presumed a *bonâ fide* and a real act — to which may be added, the other general presumption, that the acts of men must be taken *primâ facie* to be innocent ; whereas if this transfer is fictitious, here is a criminal transaction of a direct trading with the enemy. Other more particular presumptions have been called in aid. It was said, that it was highly improbable that British merchants should send their property of immense value to an enemy's port, where it would run the hazard of confiscation. To estimate the weight of that presumption, I must recollect what was the situation of Batavia ; a settlement loaded with valuable produce, which they had no means of exporting, nor any sufficient opportunities of sale. In this state of things, they would be likely enough to favor the access of every customer, without inquiring very minutely into his national character ; if a man came there with good bills to hand off these valuable products, he might wear a very thin veil without much hazard of their peeping under to discover the real country to which his capital belonged ; a slight covering would suffice, without any danger of a severe curiosity. It is said again, that there could be no inducement ; but to that the state of the settlement I have described is a complete answer, for in such a state there must be the temptation of most extraordinary good bargains. It is hardly possible not to no-

tice, upon the subject of presumptions, something of a counter-presumption, \* that if British subjects meant to adventure in a trade of that nature, Fredericksnagore is a convenient neighbor to call in aid of such projects. It is near Calcutta ; and the opportunity of communication open and constant.

Not only the bill of sale, but there are other papers which have a regular appearance ; so that if the court pronounces against the claim it must pronounce that these papers, several in number, are mere fabrications, utterly void of truth. The first observation made on the part of the captors is, that upon any supposition the papers would be regular ; and it is true. For the very intention of the fraud is, (if it be a fraud,) to deceive by the regularity of the papers ; it is the necessary apparatus and machinery of such a case, and therefore it is by no means enough to say, " Our papers are all in order."

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What, it is asked, do you hold papers for nothing? Are we to have a new law of nations, in which it is to be held that regular documents are of no avail? Certainly not; such papers, duly verified and supported, are strong *prima facie* evidence in all cases, and, if unopposed, are conclusive evidence; but if there are circumstances and facts appearing in the case, leading justly to the conclusion that those papers, though formal in themselves and though formally supported by oath, are nevertheless false, it would be ridiculous to say that the court is bound by them. It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment. Unquestionably a Court of Admiralty will proceed with all requisite caution in determining against regular papers regularly supported; but if the papers say one thing \* and the facts of the case another, the court must [ \* 253 ] exercise a sober judgment, and determine according to the common rules of evidence to which the preponderance is due.

The first question that occurs upon regular papers is, whether they are duly supported by the oath of the master. For he is the person who is expected to verify the transactions. But unfortunately, in the present case, here is a preliminary question to be settled, namely, who is the master; for there are two persons to whom that character is attributed, — Hals, and Elmore, the person who had been master before the transfer. Hals says he himself was master; so says the mate; and so says Elmore. But one witness, Roma, says no; that Elmore was the real master, and Hals merely colorable master, without any real authority or concern whatever respecting either the ship or the cargo. It is a material question, touching the credit of these witnesses, and, by so doing, affecting the merits of the case in whom the character of master really resides. Roma has been described by the counsel for the claimants themselves as ignorant, but not corrupt, — and he is certainly ignorant on points which he had not the means of knowing; but, upon those points, it is observed he speaks with modesty and reserve, and in an avowed style of mere supposition and belief. Is there any instance in which he has taken upon himself to speak confidently where he had not the means of knowing certainly? I find none. With respect to the witnesses who contradict him, he has a right to have applied in his behalf that test, to which all witnesses produced in all courts of justice are subject, namely, that any one detected falsehood in their \*depo- [ \* 254 ] sition overthrows the whole of their credit. I am well aware that this rule may be too rigorously pressed to the disadvantage of a very fair witness. On a public examination a witness may, by sudden and ill-understood questions, be made to commit contradictions

which are to be held up as fatal to his general testimony. But where a witness is examined deliberately and in private upon interrogatories prepared, and has the opportunity of weighing his answers before he finally signs them, they being read over to him, it must at least be admitted that whatever other disadvantage such a mode of judicial inquiry may be exposed to, it can never be seriously urged that a witness has been entrapped by surprise and through inadvertence,—has been made to say that in hurry and confusion and mere weakness of nerves and apprehension, which, on recollection and deliberation and the free use of his understanding, he has a right to unsay; and, therefore, in courts proceeding in this course of examination, the rule of *falsus in uno falsus in omnibus* is a rule of unexceptionable justice. Now to apply this test, Mr. Hals (to whose prejudice I am unwilling to strain any thing) says, in positive terms, “that there were seven passengers on board this vessel. Their names were John Elmore, John Ewing, two children of a Mr. Eade, of Bengal, a child of a Captain Dawes, a black servant belonging to the same children, and a black servant belonging to the second mate; that the said John Elmore is an Irishman, formerly master of the ship, and at times assisted the deponent in the navigation of her.” According to this account Elmore was a mere passenger and nothing else, occasionally giving a voluntary assistance and [ \* 255 ] nothing \* more, as any other mere passenger might do.

The mate, in like manner, or rather with more reserve still, says that there were such and such passengers, and amongst them Mr. Elmore. Now it does happen that Mr. Elmore himself is examined; and, first, what does he say with respect to the passengers? He says there were four passengers on board; Mr. Ewing, an American, and three children, whose names he mentions. According, then, to this account, there were only four passengers, of whom he does not at all number himself as one. He is asked in another interrogatory, “In what capacity he belonged to the ship?” He answers, “that he was sea-pilot, or navigator, and that he was engaged to go in that character upon this voyage;” he has not thought it necessary to mention upon what terms. But he says this official character did belong to him; he was an officer on board the ship, and so appointed by Mr. Krefting. Now, if this be the case, I ask is it a true representation or a false one which Hals has knowingly given of this matter? This question must be determined by what every man must understand Hals meant to convey respecting the situation and character of Elmore. If he meant to convey this impression, that Elmore was a passenger and a passenger only, who occasionally lent a hand from mere inclination, is not that a gross



falsification on the part of Hals, who, being the master of the vessel, could by no possibility be ignorant that Elmore was on board this vessel as a hired officer, on a contract with their common owner. Taking it in this view, I cannot but think that it would be a most unnatural strain of charity, such as must do violence to any man's understanding or his sincerity, not to pronounce [\*256] that Hals has most grossly prevaricated in his representation of this matter. And, therefore, whatever his general character may be, about which loud outcries have been made, that must be extracted from other materials, to be found elsewhere; but, from what is found here, I am under the necessity of holding him a witness utterly unworthy of all credit in this cause; and I may venture to strike his mate out of the list of witnesses for the same reason.

The matter of fact then stands, these two witnesses being dismissed, between Elmore, on the one side, and Roma, on the other; Elmore describing himself as sea-pilot, Roma describing him as real captain. By sea-pilot, a term not very familiar to landsmen, I presume is meant the person who has the care of the navigation at sea, but has nothing to do with the concerns of the vessel in port. Accordingly, it is represented that Elmore's authority ceased entirely on coming into port; Hals appears in command. He is presented by the owner of the ship in that character to every person who has dealings with the ship or cargo, and Elmore sinks into the mere passenger, uninterested and unauthorized respecting either. But how stand the facts? Certain it is that Mr. Elmore is entered upon the muster-roll and the log-book as a passenger,—a false fact *ab initio*. In order to account for this an explanation is suggested, that this was done to prevent his being known as an English officer of this ship at Batavia, an enemy's settlement, where he might have been personally treated as an Englishman, and with some danger to the ship herself, on account of his official connection with her. If that had been the only purpose of this disguise, it would [\*257] have dropped off when he left the enemy's country and the danger ceased. How comes it about that, even so late down as on the present examinations, long after all fear of the Dutch was out of the question, Hals and the mate still hold out this man as a mere passenger? The explanation, therefore, is but a half covering for the fact. As to subsequent transactions, it appears that Elmore confined the chief mate, by an act of his authority, during the passage; that he gave the orders for stowing the cargo; and that, during the voyage from Calcutta to Batavia, he sold boxes of opium, a commodity of which a very large value will lie within a very small com-

pass. Roma says that he went down into the hatchway to sling them up; and, on asking Elmore if it made any odds as to number or marks, he said no, and directed him to take the first that came to hand. These are acts of power rather beyond the functions of a sea-pilot. At Batavia how is he employed? An application is there made by a person for a passage to Europe; this application is not made to Hals, but it is made to Elmore, under the denomination of Captain Elmore. The pretence set up is, that he, being an Englishman, it was natural the application should be made in this way; that is an explanation that has but half a coloring in this case, for he lets the cabin to this person. He describes the cabin as my cabin, and the price as my price. The same observation applies to the act of confining the chief mate. That authority was exercised by Elmore; but there is a sort of formal paper exhibited, in order to show

that that might be done by order of Hals. There is also [ \* 258 ] impress-money, which he pays in his own name. Why, it is said, in answer to all this, that this was an act of necessity; that he was obliged to transact this business, because he himself was unable to go on shore, and dared not to set his foot in a hostile port. Now I think the letter which is exhibited here, written by this person, does give the most effectual contradiction to such representation. It is a letter addressed to Messrs. Lambert & Co., in which he says: "I assure you I have not had a foot on shore since Mr. Ogilvie left the ship at Calcutta. I was not allowed to take an English assistant, and a Dane could not be procured for any money; two hundred rix dollars were offered. I left Bengal with two assistant Danes. The one was constantly inebriated; the other, the second, so ignorant, he did not know the right end of a hand-spike."

This is not the style of a man having nothing to do but with the sea-navigation of this vessel. It is said, that this is a mere effusion of vanity; a vain-glorious air of representing himself as a commander, where he was not. Not very likely, I think. Mr. Elmore is a man advanced in years, much beyond the vanity of youth. He had been master of this vessel, and therefore was not very likely to turn giddy with such an elevation. He goes on to state, "and I am certain, had I left the ship for one day, that we should not have a man on board the next." That passage conveys to my mind a decisive impression, that this man remained on board the ship, not because he was afraid of going on shore, or had any personal apprehension from the Dutch, but because he had the authority of that ship, and certainly wrote as the master. Then, if that is the case, what becomes of the

[ \* 259 ] plea set-up? I say, a more direct misrepresentation could

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The Odin. 1 C. Rob.

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not be furnished, than is affected to be given of this transaction. To be sure, there were twenty reasons why this man should be held back in this transaction ; for certainly, whatever the truth of the transaction might be, it was to appear a matter perfectly fair. It must be a part of the scheme, *à priori*, that the outward appearance was to be Danish, totally un-British, if I may be allowed so to express myself. A British master would have been an inconvenient personage ; still more the former British master. If a Dane had *bond fide* purchased, the former English master is the very last man he would have chosen to have left on board, and especially with any share of command in her. A Dane must have felt, that it was for his interest in the river Hughly, as well as at Batavia, to have not a shade of British complexion remaining upon his property.

There is much collateral evidence arising from other circumstances, of which Hals's rate and state of expenses is one. Krefting, the supposed owner, writes him a letter, in which it appears that he was to be allowed for his expenses at Copenhagen sixteen dollars a month, (about twenty pence a day,) and he is not to spend more. Now, without supposing that the master of a Danish East Indiaman is accustomed to the same style of establishment which is known to exist in British vessels of the same description, and making all reasonable allowance for the difference of money at London and at Copenhagen, and for the different habits of luxury which may prevail in those places, I cannot but think it an extraordinary thing, that the master and manager of such a valuable East India \* ship and [ \* 260 ] cargo as this (stated to be 150,000*l.*) should be restricted by his owner to so severe an economy as twenty pence a day, on his arrival in the capital of his own country in Europe. It is impossible that this can be the allowance made to the real master of the vessel. As to transactions of business at Batavia, the balance, in point of agency, is without all comparison on the side of Elmore. He does every thing that is done, and appears to have the whole of the confidence. Great reliance was placed upon the objection that Elmore could not be the captain, because he was not to complete the voyage ; he was to leave the ship in England, and not to go on to Copenhagen. I can't think that much attention is due to that. Precautions were taken for forwarding this ship on her arrival in Europe, from England to Copenhagen, and for managing her concerns there. The voyage was substantially completed on her arrival in Europe. And to say nothing of the plea of ill health, which made it desirable to Elmore to quit the ship in England, there are other reasons, obvious enough, why it should be deemed prudent for an English captain of a foreign East Indiaman to retire from the ship as soon as

possible after she reached England, coming from the ports of the enemy.

Upon the whole, I am satisfied, judging as carefully as I can, that Elmore was the real master of this vessel. That being determined, how does it affect the truth of the transaction of the sale? He was master to the time of the sale. Hals proves that he delivered him possession of her. Elmore gives a different representation, for he says that Krefting delivered possession; and though the [ \* 261 ] counsel have accounted for this, by saying that Krefting delivered possession by the agency of Elmore, I cannot but think that the explanation would have come rather in a more satisfactory form, if it had been furnished by Elmore himself in his deposition. It is clear, then, that Elmore was the master up to the time of the transfer. It is likewise clear that he was master afterwards, and upon terms of particular intimacy with the owner, Mr. Lambert; for there is a letter produced, in which he gives a confidential account of his private concerns, addressed to Mr. Lambert, under the title of "My dear friend." Now it appears to me, that a master, standing upon this footing, could not but have been apprized of the material circumstances of the transfer of this East India vessel, of which he was master before, and continued so afterwards. Let us, then, see what he says upon the purchase. Being asked on the 9th interrogatory, he says, "That Jacob Krefting was the owner of the ship at the time of seizure. His cause of knowledge is, that he gave directions concerning the ship, and engaged the deponent to go as pilot on the voyage under Captain Hals, and that Krefting was always received, when on board, by Hals, as the owner, and saluted as such." That is all he knows about it. He is asked about the bill of sale; he says, "It was made by the former owners to Jacob Krefting, but he can give no farther account of it, having never seen it." On the concluding interrogatory, he says, "That the ship was built for the house of Lambert and Ross & Co. of Calcutta, and they sold her to Krefting, in December last, at Calcutta, as he believes." He knows nothing then of the bill of sale, nor of the conditions of [ \* 262 ] sale, nor anything about it, except what he learns in this distant way from observation and general inquiry. Now, I cannot but think, that if such sale had taken place, it was impossible but that he must have had a complete knowledge of it. He, therefore, either dissembles his knowledge of a transaction which he must have known, or no such transaction passed. To make it more incredible, it appears that this person, in one of his letters to Lambert, says, "You know Krefting has appointed me sea-pilot;" referring to the course of events that had taken place, as matters of mutual com-

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munication and knowledge. Looking to all these circumstances, I am bound to say, that Elmore is discredited, and that the discredit of such a person, attention being had to all his relations towards this ship, does in a most material degree involve the discredit of the transfer itself.

Upon the papers, then, it is stating this case charitably to say, that it is a case of further proof, the papers being in no degree supported. As to depositions, Hals and the mate I have dismissed; Elmore professes entire ignorance; Roma says he heard it reported that the ship belonged to Lambert and Ross; it may be said that this leaves it at large. It becomes then necessary to notice other papers of a less formal nature, but which are of no small importance in the decision of this cause, — I mean three letters to Mr. Lambert. It is admitted by the counsel for the claimants that they are not without their difficulties; at the same time it is to be remembered that difficulties may appear in a very fair transaction. But if the transaction is fair, a clear and certain explanation is to be expected and the rather because the parties \* are on the spot who can supply [ \* 263 ] it. It is the fate of this court, frequently to have cases submitted to it loaded with difficulties which it is very laborious to remove, because the parties, from whom alone explanation could be obtained, are living in another quarter of the globe. It sometimes happens, (it did so, very much to the satisfaction of the court, in the American case of *The Providence*,) that the party is in court, and does, with a promptness that beats down all suspicion, give solutions as fast as objections are proposed. In the present case, Mr. Lambert, the party, is in London; for though this is not expressly admitted, yet the whole turn of the argument supposes, that the Mr. Lambert now in London, and the Mr. Lambert who was then in India, and was returning to Europe, is one and the same person. He is, therefore, at hand to furnish all necessary explanations to the counsel, and he was bound in justice to give all the assistance which must unavoidably have been required. The court, therefore, had a right to expect that the difficulties in these letters, which are addressed to himself, would have received explanations; not such as can be traced no further than the mere ingenuity of counsel, of a nature merely conjectural at best; but explanations arising from an intimate knowledge of the transactions, and consequently having all those characters of certainty, and singleness, and clearness, which prove at once the truth of the facts and the truth of the explanations.

The letters exhibited are three in number. No. 7, is a letter, dated Batavia, March 3, 1798. There can be no doubt, upon the comparison of hands, that \* this is a letter from Mr. Elmore, [ \* 264 ] and it is subscribed with his initials, J. E.

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The Odin. 1 C. Rob.

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Dear Sir,— The Odin arrived here the 1st ult. Capt. Halse is taking in a cargo on account of Mr. Krefting, as Mr. De Coning's freight would not answer his purpose. He does not expect to leave this place until the 1st of May, which will make it December before I can have the pleasure of seeing you in London. J. E."

Now the explanation given of this letter is, that it might be for no other purpose than to inform Mr. Lambert, the friend of the writer, that he should be in London in December, and not before. If that be true, what occasion is there for the writer to enter into the history of The Odin and her cargo? Why inform Mr. Lambert, who was unconcerned in the ship and her cargo, that Capt. Hals is taking in a cargo on account of Mr. Krefting, as De Koning's freight would not answer his purposes. This was perfectly immaterial as to the matter of delay; because the taking in a cargo for one person would just take up as much time as taking it for another. But if Mr. Lambert was really represented by Mr. Krefting, the nominal party, it was most important intelligence. It informed him, in a very few words, that there was a cargo coming home on his own account; that of the two modes of proceeding proposed, it had been found advisable to adopt this, and that he might insure, and take other measures accordingly. As to the suggestion, that all this was for the mere private amusement of Mr. Lambert's curiosity, about what was passing at Batavia, (as a man interested in the transactions of the [ \* 265 ] East,) I \* must observe, that the mere insignificant information about this ship and her cargo is a very poor selection of topics for such a purpose, and that the letter is addressed in the absence of Mr. Lambert to Messrs. Prinsep & Co., who could certainly feel no curiosity about any such matters.

The next letter is taken from The Nancy. The particulars contained are numerous; and it has been argued as if every one of those particulars must be taken for true. By no means. If persons are driven to the necessity of sending information by other ships concerning matters which are not to be fully avowed, it is not to be supposed that the truth, and the whole truth, will be disclosed. Such letters, the parties very well know, are themselves liable to be intercepted; they will therefore be framed with a view to that accident. They will contain as much information as may be necessary, and no more; and they will be mixed up with other matter giving the business an inoffensive complexion. Such letters are half natural and half artificial; all that makes for the writers is to be suspected, and all that makes against them may be literally and safely applied.

The letter states, "The Odin will certainly sail from this place the

first of next month, loaded entirely on account of Mr. Krefting, being the return of four hundred and ten chests of opium, and two hundred and eighty bales of piece goods; the former sold for three hundred rix dollars per chest, the latter thirty per cent. on the invoice. The returns are a specified quantity of sugar and coffee, which entirely fills the hold." Now, although he had already informed him of the arrival of The Odin, yet he enters into all the particulars of the cargo, and the "management of it, in a most minute manner; and he concludes, "be so good as to order me a pilot to relieve me at Dover, to carry the ship to Copenhagen, &c."

Now, why all these minute particulars respecting this ship and cargo to Mr. Lambert, if he was totally unconcerned with the ship and cargo? Why is he to provide pilots? If Mr. Krefting had really purchased this vessel, is it not to be presumed that he had taken all due care to make arrangements of that sort, and had not left it to the chance of Mr. Elmore, the sea-pilot, writing a letter, upon the further chance of Mr. Lambert's having arrived in Europe? It has been observed, by way of explanation, of Mr. Lambert's being so minutely informed of the lading of this vessel, that he might have an interest in the insurance of this cargo made at Calcutta. That could not possibly be, because it was perfectly uncertain whose the cargo was to be, De Koning's or Krefting's; and likewise, because it is perfectly clear, that Elmore, the writer of that letter, asserts, in his deposition, that he knew of no insurance whatever. The third letter is that already referred to, in which Mr. Elmore writes, "that he had not set a foot on shore, &c."

Thus then stands the case upon these letters; and they certainly speak a language inconsistent with the formal documents. It is impossible to account for these letters on any supposition that Mr. Lambert was totally uninterested in this ship and her cargo. The test proposed is a perfectly fair one; show authentic documents that are inconsistent with the transaction as a fair transaction, and it is overthrown. Twenty fair papers may appear, be the transaction what it may; but it is impossible that a contradictory "document" [ \* 267 ] can appear, coming from the parties themselves, and yet the transaction be true. One document of that kind reduces the matter *ad absurdum* and impossible. The balance stands thus: All those other papers may be fair, and yet the transaction be false; but this paper cannot, by any possibility, be here, if the transaction be other than false. Let us briefly consider the *res gesta*. Mr. Lambert and Ross are the asserted sellers of this valuable ship; the ship is going to Batavia to take in a valuable cargo from the enemy's settlement and carry it to Europe. Elmore, their former master, is the

person employed to carry this project into effect. It was rather to be expected that Messrs. Lambert and Ross would discountenance such an undertaking, as well on account of its interference with British interest in India, as on account of its being a direct unauthorized communication with the public enemy, for the purpose of relieving them out of their commercial distresses. The court is sorry to observe, that a number of British subjects, in the character of officers of this ship, are associated in this undertaking, not only against the rights of the British East India Company, but against their allegiance. Are they not aware, that it is something very like misconduct to go to the enemy, without any permission, for a purpose of this nature? It is hardly to be conceived that Mr. Lambert and Mr. Ross, without some very considerable interest in such a transaction, would give it the aid which it appears they did. Here is a foreign East India undertaking, discountenanced in a very high degree by the laws of this country, so

far as British subjects can be concerned; here is a public [ \* 268 ] direct trading with the \* enemy, for the purpose of relieving

the valuable products of his eastern settlement from the embargo under which the naval successes of this country had placed them. How far such an adventure has a right to use the convenience of British ports in Europe, and of British agency in such ports, may be matter for some consideration. But at any rate, the degree of communication, and correspondence and agency in which Mr. Lambert is connected with the transaction, does very much favor the supposition that all his interests in this vessel, of which he was recently the undoubted proprietor, were not completely divested. So much for the letters. Who is the purchaser? A Mr. Krefting; Mr. Krefting is described to be second in council at Fredericksnagore. I presume I do no injustice to that settlement, when I say, that our idea of a second in council there, is not to be formed upon exactly the same scale with that of a second in council at Calcutta. In other papers he is described, I observe, director of the auctions and a notary public. He appears to have gone to the east, in 1787, and to have resided about two years of the intermediate time in Europe, part of which was spent in England. I am well aware of the rapid manner in which fortunes are accumulated in that quarter of the globe, and therefore, am not prepared to deny that Mr. Krefting might have accumulated a fortune of 150,000*l.* which is required to cover the present adventure. But there is a letter exhibited, which makes a strong impression upon me; it is written by Mr. Krefting, the second in council, to Hals the master, the person who is restricted, in his expenses in Europe, to 1*s.* 8*d.* a day, and therefore, one would

[ \* 269 ] expect \* to be written with all the distance which such a dis-



parity of situation begets and requires ; accordingly the formal papers are all composed in a style corresponding to their difference of fortune and condition. But this is a letter written in a style of the utmost familiarity — in a tone which the counsel for the claimants have represented as savoring of idle jocularly. “ My dear Hala, — Whether it will please or displease you, I cannot tell ; upon my soul I cannot send you the beef you desire, for there is not time for it ; and I am already seventy-two rupees in debt to Dawes, which I cannot immediately pay ; and now to go and raise a new account, it will not do ; upon my soul it is not for want of inclination.” This is said to be jocular. I have but a dull fancy in matters of that sort, and, therefore, cannot pretend to limit the effusions of a sportive fancy ; but to me it appears to be a very serious plea *in forma pauperis*, in which it is represented, that the writer, who is the owner of an adventure of 150,000*l.* value, is disabled from sending a small supply of beef on account of his having already run up a score with his butcher to the amount of seven or eight pounds. Make what allowance you please for the difference which may happen to exist between two East India companies, it is impossible to avoid two conclusions on reading this letter ; that the person to whom it is addressed could not be the real master of a great East India vessel, and that the writer could not be the real owner of that vessel, together with her cargo, amounting to 150,000*l.* I say nothing further of the gross improbability, that if Krefting had really purchased this adventure, he would have been so imprudent as to endanger interests of \* such magnitude, [ \* 270 ] by connecting with the conduct and management so many British persons, and particularly the British merchants from whom they are affected to be purchased.

There is only one person more to whom I shall advert ; that is Mr. Elmore, the former British master, continued in his employment, and continued under a mask — the fact attempted to be dissembled, but clearly proved — this same captain corresponding on the concerns of the adventure, and with the former British proprietors. Can any thing look more like a mere shifting of name, and nothing else ? A mere nominal transfer, all substantial interests remaining the same ?

This, then, is the general view (omitting many particular remarks made by the counsel,) which I am disposed to take of this case, as well respecting the cargo as the ship ; most of the observations affecting the cargo as well as the ship, and indeed with superior force, on account of its superior value. What is the court to do upon this view ? Further proof has been rather rejected on the part of the claimants, on account of the distance of the parties from whom it could be obtained ; although I can't help thinking that there are per-

sons nearer at hand who could give a pretty full account of the matter. [*Laurence.* We did not mean to be so understood.] Then I will take it the other way. Farther proof is now asked, but it is not much pressed. I have stated the general impression which the case has made upon my mind; and it is the perpetual comfort and consolation of the chair which I fill, that any erroneous impression of mine will be corrected by a more enlightened tribunal. It is my [ \* 271 ] \* duty, however, to determine them according to my own impression; and following that guide, I pronounce my judgment to be, that Mr. Kresting is not the real proprietor of this ship and cargo, and I, therefore, reject the claim, and condemn the property as lawful prize.

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THE TWO FRIENDS, M'Dougal, master.

March, 19, 1799.

The Court of Admiralty will exercise a jurisdiction over a foreign ship rescued from the enemy, if there is any British subject concerned in the rescue, who prays to be rewarded here.<sup>1</sup>

THIS was a case of salvage on recapture of an American ship by the crew, part of whom being British seamen, and praying to be rewarded, the cause now came on to be heard on protest against the jurisdiction of the court over an American ship.

In support of the protest, the *King's Advocate* and *Sewell*. However much persons may differ in opinion respecting the policy of encouraging rescues of this sort to be made from the enemy by the crew of a captured vessel, it certainly is not from the owners that any objections are to be expected; it is not for them to deny that the parties who recover property for them ought to be liberally rewarded. There is accordingly no disposition in the owners in this case to withhold a very liberal recompense from any whose services are acknowledged. But it is by no means admitted that the services of Miller and the other British seamen, were such as they represent them; and it is conceived that this is not the proper jurisdiction before which

American owners are to be called, to contest the demands [ \* 272 ] of one or two of \* their crew. It is hoped, therefore, that

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<sup>1</sup> [The *Johann Fredierich*, 1 W. Rob. 35; The *Jerusalem*, 2 Gall. 192.]

the liberality of their intention will not be questioned on account of the resistance which they think themselves bound to make to those claims.

As a recapture from the enemy, this case is a case of prize, and it is not to be argued, that this country can exercise a prize jurisdiction, any more than any other jurisdiction, over foreigners. In respect to other matters, there have been many cases in which the court has always cautiously declined such an interference. There have been instances of suits for sailors' wages between foreigners, which the court has always rejected; and it would be a ground of great jealousy if it were now to depart from that practice in respect to America, and to assert a jurisdiction over American subjects, especially in matters of prize. That there was an Englishman concerned in this affair can confer no jurisdiction, for such a distinction would be attended with endless confusion. Suppose an instance in which, Spain being a neutral, a Spanish sailor, being one of the crew of an English ship recovered from the enemy, should apply to Spanish courts of justice for his recompense; by the Spanish law, after twenty-four hours' possession, the whole would be prize to the recaptors, while we should allot only a certain proportion. How could such a difference be reconciled? Or how can it be supposed that the English owners would submit to such a determination?

These are the objections on the supposition that Miller was a passenger, as he represents himself. But the fact is, that he was enrolled as one of the crew, and signed the ship's articles in the rank and situation of carpenter. In that case his national character \* must be taken from the service in which he is employed. [\* 273] But there is an affidavit produced, stating his signing to have been by mistake, and explaining the reasons why he assumed the character of carpenter as a disguise; and there is a note produced also to show that he actually paid for his passage; and it is argued that he is to be considered as a passenger. At most this is but parol averment against his own act, and, therefore, not much to be regarded. It is, besides, not clear that the note was not given for collusive purposes. It is submitted, under these circumstances, that as carpenter he must share in a subordinate capacity, and not to the extent of his present claims; and that even that share cannot be allotted to him by this court.

In respect to the cargo of this vessel, the warrant is directed against the whole; but part had been before landed and delivered to the consignees, and, therefore, the process of the Court of Admiralty cannot reach it, as being *in rem* only, and not extending to goods on shore, as

it was determined in the case of *The Ooster Eems*,<sup>1</sup> in the last war. The parties have, therefore, lost their remedy against that part, and must be referred to the courts of America, where they may have full redress against the owners in another way. The court asking whether any offer had been made to the other part of the crew, it was said, that the underwriters had offered the master a reward of five per cent., with which he was satisfied; that the American sailors had been referred to the courts of America, by the American ministers; and that Miller being considered as an American, no separate offer had been made to him, except to settle the matter by arbitration.

[ \* 274 ] \*Against the protest, *Laurence and Swabey*. This case divides itself into two questions; a question of jurisdiction, and a question of merit on the facts. It is said, that there have been cases in which this court has refused to interfere between foreigners. Undoubtedly there have; but those were not cases in which the matter was concluded, as it is in this present case, for it is a material circumstance that this voyage was to have ended at London. Besides, salvage is a favored principle of the law of all nations; it is not a matter of domestic jurisdiction, but one that is to be settled and adjusted wherever the voyage ends. It is said, that the court will not entertain suits for wages between foreigners, but for this reason, that the contract for wages cannot be the subject of a suit till the return or end of the voyage. There are, however, other questions which the court does frequently entertain between foreigners, such as bottomry, on which suits have often been entertained in this court between an Englishman and a foreigner, or between two foreigners, as a suit which is to be determined where the voyage ends.

As to the hypothesis of the Spanish case, it does not apply, because, if the court of Spain had interposed on such an occasion, they would have acted on the principles of English law, and on the general law of nations, to assign a *quantum meruit*. In the same manner, these parties, when they have given an appearance, may plead any thing particular or special in the law of America that they think fit; but otherwise the court will be at liberty to use its own discretion.

As to the part of the cargo which has been landed, it is [ \* 275 ] to be observed, that this is a matter of prize, and \* in such cases the court has a jurisdiction over the cargo or proceeds, in whatever hands they are found, even on land. In the process of the civil Court of Admiralty it is otherwise; but the Prize Court is

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<sup>1</sup> July 14, 1784. [1 C. Rob. 284 n, Pref. to Hay and Mariott, p. xxvii.]

known to have such a power. This is a case of recapture, differing in nothing from a case of capture or prize, and, therefore, it is competent to this court to follow the proceeds into the hands of the consignees. It is, besides, observable in this case, that the conversion has been made since this monition issued; the parties, therefore, acted after notice, and in contempt of the process of the court. The monition having issued on the 18th of October, and the sale being stated, even in their own affidavit, to have been subsequent to that time.

In respect to the merits of the parties —

Court. It seems to me that the question at present is confined simply to the jurisdiction. In this stage I could not proceed to adjudge the reward, was I so disposed. The most that I can do will be to overrule the protest as to the jurisdiction of the court.

#### JUDGMENT.

SIR W. SCOTT. This is a case of an American ship taken by the French, on a voyage from Philadelphia to London, and afterwards rescued by her crew.

It is allowed to have been a rescue very much to the advantage of the owners, as a considerable reward has been already paid to the master by the underwriters. I shall not now, however, enter into a discussion of the facts, for the purpose of settling the total of the reward, or the proportions to be assigned to the particular actors in the service, because a \*previous question has been [\* 276] started respecting the jurisdiction of the court. It appears that there has been an arrest, by process, of the ship and of such goods as had not been delivered on shore; but that some goods had been landed and delivered whilst a negotiation was going on between the parties to settle the reward. An appearance has been given under protest, as to the goods landed. But that cannot, by any possibility, legally avail, except as to those goods so landed on shore, so far as it is founded on the mere circumstance of locality. For the rest an appearance has been given generally. But still I am willing to say, that if there was a well founded objection to the jurisdiction of the court in general, I should not think it right to hold the parties either to their general appearance or to the mere grounds of their partial protest.

It has been slightly questioned in the act of court, (which contains the exposition of facts given in by both parties,) whether there was such a state of hostilities between America and France as to raise a title to salvage for American goods retaken from the French.<sup>1</sup> But

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<sup>1</sup> [Talbot v. Seeman, 1 Cranch, 1.]

this point has not been pursued in argument; and indeed I should wonder if it had after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say whether America is at war with France or not; but the conduct of France towards America has been such, *de facto*, as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers, by force of arms. In this very instance it seems to have been so understood; for the underwriters, representing the owners, [ \* 277.] have rewarded \*the master of this vessel for an act which would, on any other supposition than that of subsisting hostilities, have been reprehensible. For although it is meritorious to rescue by force of arms from an enemy, it is quite the reverse to rescue from a neutral, from whom the owner would have a right to claim costs and damages for an unjust seizure and detention.<sup>1</sup> If, instead of this, a rescue by force is attempted, and the party takes the law into his own hands, it becomes a breach of the law of nations, which would endanger the ship and cargo if that attempt should be disappointed. If, therefore, the French seizors were to be considered as neutrals, the owners would have reason to complain that this rescue had exposed their property to unnecessary hazard, instead of preserving it. These owners are, therefore, barred by their own act from objecting against the necessity and the legality of salvage, whatever may be the present situation of affairs between America and France.

This being disposed of, I come now to a second position, that every person assisting in rescue has a lien on the thing saved. He has, as it has been argued, an action *in personam* also, but his first and his proper remedy is *in rem*; and his having the one is no argument against his title to the other. Then where is this lien to be demanded? It should seem that that was an unnecessary question to be proposed when the goods were admitted to be in England; but, strange as it may appear, it is argued that this claim is to be enforced in America, because the ship is an American ship and the parties are American sailors. In the first place, I am satisfied that these persons are not to be considered as American sailors.

[ \* 278 ] They are \*British-born subjects returning to their own country, without any engagement or intention to go back to America, and without having any domicile there, and merely working their passage homeward on board this ship. They are, then, not at all in the condition of American subjects; neither are

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<sup>1</sup> [The War Onskan, 2 C. Rob. 299 and note.]

they so to be considered in this act, even if hired as mariners on board this American vessel. For this act was no part of their general duty as seamen; they were not bound by their general duty, as mariners, to attempt a rescue; nor would they have been guilty of a desertion of their duty, in that capacity, if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubts whether it ought to be so regarded, I desire not to be considered as one of the persons who entertain any such doubts. But it is an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship in discharge of any official duty, either ordinary or extraordinary. The opposition, therefore, to the jurisdiction of the court fails in its foundation of fact, that these are American seamen. But it is asked, if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or, conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of the *jus gentium*, and materially different from the question of a mariner's contract, which is a creature \* of the [ \* 279 ] particular institutions of each country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases, and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined.

It is said different countries may have different proportions of salvage; and, therefore, an inconvenience may arise from such interference. But I do not know that there exists any rule on this matter beyond that which subjects such matters to a sound discretion, distributing the reward according to the value of the services that have been performed. There is no rule prescribed in the English law, nor do I know of any in the codes of France or Spain, applying to the cases of foreign property rescued. In cases of rescue between English subjects, this court usually adopts the proportion of recapture, but it is not bound to do so; and, in respect to foreigners, there is no rule but that of the *quantum meruit*. Indeed I believe this is, perhaps, the first case in which a foreign rescue has been made by

British assistance. As to the case which has been put of a rescue by a crew, of which nineteen should be English and one a Spaniard, I cannot see that any great difficulty would ensue. The case of recapture is provided for by the regulations of Spain, but I [ \*280 ] do not recollect that the case of rescue is so ; but \*supposing that it is, and that it gives the entire benefit of the rescued property to the rescuers, and that it was necessary or at all proper to decide such a mixed case with any attention to that rule, the whole effect, and, therefore, the whole inconvenience would be, that one twentieth part of the property would be condemned to that Spaniard, — for there is no pretence to say that the nineteen Englishmen would be entitled to any benefit from such a rule.

These considerations, therefore, found no solid objections against the exercise of the jurisdiction ; but I go farther and say that I think there is great reason for it, because it is the only way of enforcing the best security, — that of the lien on the property itself. Between parties who were all Americans, if there was the slightest disinclination to submit to the jurisdiction of this court, I should certainly not incline to interfere ; for this court is not hungry after jurisdiction where the exercise of it is not felt to be beneficial to the parties between whom it is to operate. At the same time, I desire to be understood to deliver no decided opinion whether American seamen rescuing an American ship and cargo, brought into this country, might not maintain an action *in rem* in this court of the law of nations. But if there was British property on board, and American seamen were to proceed here against that, I should think it a criminal desertion of my duty if I did not support their claim.

In the present case no American seaman has appeared, nor is it proved that there was any British property on board. But as to these British seamen, holding no connection with America and having rescued foreign property, I have no doubt that they [ \*281 ] \*are entitled to have their services rewarded here ; for it would be but a mere mockery and a derision of their claims to send them back to America, to hunt out their redress against each individual owner of separate bales of goods. It were better to inform them that they were entitled to nothing, than to remit them on such a wild pursuit. I should, therefore, think it a reproach to the courts of this country if they were not open to lend their assistance in such a case.

I must do the owners themselves the justice to observe, that they seem to have been so sensible of the impropriety of such a proceeding, that they have referred the matter to the insurers here in this country ; and it has been said that the insurers are the proper per-



sons to distribute the reward. It might happen that property was not insured; what is to be done in such a case? I know of no necessity that exists for an arbitration on such a matter. If the parties agree, and the arbitrators offer such terms, from equity and liberality, as induce them to abide by their arbitration, there can be no objection to that. But to say that the claimants are of right to abide by any arbitration, and that they are compelled to an arbitration when they have a legal right to a legal decision, is not a very reasonable expectation.

I think I might say, without just offence, that insurers, if arbitrations were necessary, are not the fittest persons to be resorted to as arbiters; for this simple reason, that they, being generally the persons who are to pay, are not exactly the persons whom a considerate man would select to determine the quantum of payment. On a question between those who are to pay and those who are [ \* 282 ] to receive, either of those classes of men are but ill prepared to decide. It will not be understood to be any reflection on the known liberality of British insurers when I observe, that one great end of the institution of civil society is to prevent men from being judges in cases wherein they are concerned, and to remit the decision of adverse interests to those who can have no interest whatever in the determination of any such cases. I am of opinion, therefore, that the jurisdiction of the court is well founded, and that the parties had a right to resort to it; that the circumstances of the ship and cargo being American property will not exclude the jurisdiction where there are any British subjects concerned, and where the goods are within its jurisdiction.

But another question arises, — whether the jurisdiction is ousted by the landing of the goods, so far as relates to that quantity landed. I confess I see no great advantage likely to accrue to the American owners from this objection; because if they take the case from this court on such a ground, they must go to another. And if their objection is to a British judicature, as I collect from the argument, much is not gained from going to a British court of common law; it would be but to change postures on an uneasy bed. But let us see how far this objection can avail. It is said, that the goods being on shore are out of the jurisdiction of the Court of Admiralty. With regard to the Instance Court, that may be true. In cases of wreck and derelict I have known many instances of great hardship, and, I will add, of crying injustice, where \*salvors [ \* 283 ] have been amused with negotiations till the goods were landed, and then the authority of this court has been defied, and the just demands of the claimants laughed to scorn. How far such a

proceeding would be sustained by a court of common law, is more than it would be proper for me to conjecture; farther than that it seems matter of reasonable doubt how far a change of locality, so effected, would be permitted to defeat the claims of substantial justice. There is no reason to surmise such an intention in these parties, although it does appear that the goods were landed after notice that proceedings had been instituted here.

But whatever may be the law as to wreck and derelict, I conceive it does not apply to these goods, which I consider to be goods of prize; for I know no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this court. In such cases the common-law courts hold they have no jurisdiction, and are even anxious to disclaim it. The case of *The Ooster Eems*, which has been alluded to, was very different from this. In that case there was a material distinction as to the origin of the subject-matter; for it was there expressly said, by the great person who then presided, "that those goods had never been taken on the high seas; they had only passed in the way of civil bailment, on delivery into civil hands, and were afterwards arrested on shore as prize; [ \* 284 ] it was held that there was no act of capture on the high seas, and, therefore, that they were not to be considered as prize."<sup>1</sup>

But the present case is radically bottomed in prize; and if so, all the consequences of prize will follow. If the goods are removed before proceedings are commenced, they are still liable to be called in by a monition. A different way has been taken in this case by a

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<sup>1</sup> The *Ooster Eems* was the case of a ship stranded on the Godwin Sands, on a voyage from the Texel to the East Indies. The cargo was sent on shore, and, amongst the rest, some boxes of silver were deposited with the Prussian consul. The Warden of the Cinque Ports claimed the cargo, as the property of enemies, being become a perquisite of admiralty within that jurisdiction. The master obtained a monition from the High Court of Admiralty to arrest the goods, and remove the cause from the Cinque Ports to the Prize Court, where he gave a claim for the cargo, as Prussian property. The cargo was condemned, but, on appeal, that sentence was reversed; and the Lords pronounced, "That the High Court of Admiralty had not a jurisdiction over the goods seized and proceeded against; and they reversed the decree appealed from, for want of jurisdiction." Lords, July 14, 1784.

Present, Lord Thurlow, Lord High Chancellor of Great Britain; Earl Gower, Lord President of the Council; Marquis of Caermarthen; Sir Lloyd Kenyon, Master of the Rolls.<sup>1</sup>

<sup>1</sup> [For further report of this case see 1 Hay & Marriott, Preface, p. xxvii.]

personal monition, as more convenient to the parties proceeded against. On the whole, I am of opinion that the English seamen are entitled to redress here; that these goods being matter of prize, even that part which had been landed, are subject to the jurisdiction of this court, and I shall therefore overrule the protest. That is all that I can do at present.

On the 16th of May, this cause came on to be heard as to the merits of the parties, when the court, \*after a discus- [ \* 285 ] sion of much contradictory evidence, was of opinion that Miller's statement of his own services was corroborated by the general result of the evidence; and that he was to be considered as a passenger, and not as a person engaged in the service of the ship.

The court expressed it to be a matter of importance to the claimant to have this point established, as the character and condition of the person was a fit circumstance to form a material consideration in distributing the reward; both because the nature of a reward carried with it a necessary reference to the rank and circumstances of the person rewarded, and because an elevated condition gave the person greater influence over the enterprize, and would besides expose him to greater severity of treatment, in case of failure. Being of opinion that Miller was in reality a passenger, and not the ship's carpenter, and that his services had been very instrumental in effecting the rescue, the court pronounced that he should be rewarded equally with the master; that as the master had been allowed 1,250*l.* by consent, Miller was entitled to the same sum, with an addition of 270*l.* paid by him to buy over some Danish sailors on board the French ship, and 50*l.* for personal expenses; the expenses of the suit being ordered to be paid out of the proceeds.

With respect to O'Connor, an Irish sailor, joining with Miller in this petition, the court said, that as there appeared nothing to distinguish him from the rest of the crew, in point of merit, and as the underwriters had agreed to give him 300*l.* it would be sufficient to confirm that offer.

\* *May* 31. Four American seamen, concerned in this res- [ \* 286 ] cue, petitioned to be rewarded, and were allowed, by consent, 300*l.* each, with their expenses.

*May* 10, 1799. In *The Good Intent*, Humphries, an English vessel, recaptured from the French by an American armed ship, the American salvors appeared praying salvage.

Court. This is an amicable case; there is no opposition to the

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The Haase. 1 C. Rob.

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jurisdiction of this court. There seems to have been no extraordinary merit, as the American ship was a ship of force, and no resistance was made. I shall therefore direct the usual salvage of a sixth.

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THE HAASE, Dreyen, master.

April 4, 1799.

A non-commissioned captor rewarded; the whole given.

THIS was a case of a ship taken by a non-commissioned captor and condemned as a droit of admiralty;<sup>1</sup> it was now referred to the court to reward the captors.

The facts were, the ship was a Dutch vessel, carrying a quantity of gunpowder from Batavia, to be distributed among the back settlements at the Cape of Good Hope, for the purpose of annoying the Cape. The captors took possession of the ship without resistance; but on following a part of the gunpowder which had been landed, they were exposed to the fire of musketry from the blacks, and were compelled to sustain something of an engagement. It appeared besides that the capturing ship was a South Sea whaler, and that she had lost the chief part of the object of her voyage by this service. The court gave the whole of the proceeds; one third to the owners of the vessel, and two thirds to the crew, to be divided according to the usual proportions in private ships of war.

The amount of the proceeds was 2,900*l*.

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[ \* 287 ] THE CORIER MARATIMO, Mastahinich, master.

April 9, 1799.

Demurrage given against a captor for unjustifiable detention and delay, in proceeding to adjudication.<sup>2</sup>

THIS was a case of a ship captured on the 13th of November, 1796, and carried into Shields.

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<sup>1</sup> [For note respecting droits of admiralty, see *The Rebeckah*, 1 C. Rob. 227.]

<sup>2</sup> [*The Schooner Lively*, 1 Gall. 315; *The Zee Star*, 4 C. Rob. 71; *The Madonna del Burso*, 4 C. Rob. 169; *St. Juan Baptista*, 5 C. Rob. 33; *The Wilhelmsburg*, 5 C. Rob. 143; *The Zachemann*, 5 C. Rob. 152; *The John*, 2 Hagg. Ad. R. 317; *The Fire urmer*, 5 C. Rob. 357; *The Der Mohr*, 3 C. Rob. 129.]

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The Mercurius. 1 C: Rob.

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The claim was given on the 23d December, and no proceedings having been instituted by the captors, the claimants took out a monition against the captors, to proceed to adjudication, on suggestion that there was an intention of removing the vessel from Shields to Scotland.

No appearance was given for the captors till the 26th of February, when they consented to restitution. An application was now made that the claimants might be allowed demurrage.

Court. Demurrage is clearly due. The captor has not only neglected his duty, but there appears to have been an intention of violating it still farther by carrying the vessel into another port, out of the jurisdiction of this court. On the part of the claimants there has been no precipitation, nor any attempt to throw odium on the captor. They waited nearly two months; and I must not suffer them to be prejudiced by that forbearance.

No appearance is now given for the captors. There has been some misconduct for which they are responsible, and perhaps it ought to call for more than a mere reparation in damage. I shall grant demurrage, referring it to the registrar and merchants to fix the proportion.

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Demurrage assessed, on one hundred and eighty tons, for three months and twenty days — 330*l*.

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THE MERCURIUS, Meincke, master.

[ \* 288 ]

April 9, 1799.

Freight of contraband goods refused.

THIS was a vessel belonging to merchants of Hamburgh, and taken 13th November, 1796, on voyage from Archangel to Rotterdam, with a cargo of tar, of which two hundred barrels remained unclaimed.

Application being now made for an allowance of freight, the court rejected the petition.<sup>1</sup>

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<sup>1</sup> Formerly by the law of nations, the carrying of contraband articles of war worked a forfeiture of the ship. Declaration of England and Holland against Spain, 17th

[ \* 289 ]

THE COPENHAGEN, Mening, master.

April 9, 12, 1799.

Question of freight on transshipment of prize goods, between the ship and cargo and transshippers.<sup>1</sup>

ON a petition to the court for the settlement of freight for transshipment of prize goods, between the ship, cargo, and transshippers.

## JUDGMENT.

SIR W. SCOTT. This is a ship not captured at sea, but seized in a British port, into which she had been driven by stress of weather, as it had been asserted, "merely on account of the cargo, the ship being duly documented." Duly documented is altogether a relative term; for a vessel may be duly documented in one case by papers which would not be sufficient documents in another. Thus, in ordinary cases, a Danish ship would be duly documented by a Danish pass, and other papers; but if she appeared to have been bought in the enemy's country during the war, a bill of sale would be necessary, and that duly verified and supported. In the present case the court ordered farther proof as well of the ship as of the cargo; the latter was restored on the 1st of August, 1797. But the original hearing of the ship not coming on till the 20th of August, 1797, the ship was not restored on farther proof, till the 28th of May, 1798. The ship having come in originally in distress, and wanting repairs, it became necessary to take out the cargo; and there being no warehouses at hand, it was put on board three other vessels, which very reluctantly engaged in the service, and were finally induced to do so, by a

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Sept. 1625, art. 20, and treaty between England and France, Nov. 3, 1653, art. 15. In modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expenses. Vide sup. p. 91. Bynkershoek strongly vindicates the strictness of the ancient law: "*Publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent; & nisi pacta impediant omnino publicandæ sunt quia earum domini operantur rei illicitæ.*" Bynk. Q. I. P. lib. 1, ch. 14. On the same principle, Heineccius, "*Quemadmodum ejusmodi pacta ad exceptionem pertinent; ita facile patet regulam istis non tolli, adeoq. certi juris esse, ob merces illicitas naves etiam in commissum cadere.*" De Nav. ob Vect. Merc. Vetit. Commiss. ch. ii, sect. 6. [See note to The Ringende Jacob, 1 C. Rob. 89, 91; Note to The Emanuel, 1 C. Rob. 296.]

<sup>1</sup> [As to allowing freight when voyage is not fully performed, see notes to The Emanuel, 1 C. Rob. 296, and note to The Friends, 1 Edw. 246.]

written contract with the master; and as the cargo consisted of commodities brought from Smyrna, these ships were obliged to submit to perform quarantine; and the commodities being damaged, these vessels sustained some actual injury by having them on board. As The Copenhagen was still farther detained after the cargo was restored, and was therefore unable to prosecute her original voyage, part of the cargo was sent to London, and part was put on board other ships to go on the original destination.

On these facts four questions have arisen: 1st, Whether demurrage is due for the detention of the ship? And this question lies between the owners of the ship and the owners of the cargo, for there is no application for demurrage against the seizors, nor any ground for it. 2dly, Whether freight is due for the whole voyage, or only *pro rata*? For that some freight is due is not denied. And this also is a question between the owners of the ship and the owners of the cargo. 3rdly, What sum of money is due to the owners of the three ships? 4thly, The last question arises in some measure out of the preceding one: Whether the owners of The Copenhagen, or the owners of the cargo, are responsible for this sum of money, and also for the expenses of the repairs of the ship, and other charges?

The proprietors of the ship assert that the whole is a matter of simple or particular average on the cargo only. And the owners of the cargo contend that the expenses of transshipment are a matter of general average, falling on all parties, and affecting the ship in common with the cargo, but that the ship alone must bear the expenses of her own repairs.

In the first place, the ship was not brought in by seizure; there was no bringing into port by capture. I think it is perfectly clear that she wanted repair; and that she staid in Milford Haven for that purpose, as well as for the purpose of proving her neutral character. It appears also, that the proof of the character of the ship took up more time than that of the cargo. Under these circumstances there cannot be the slightest pretence for a claim of demurrage, against the cargo, on any ground whatever.

2dly. With respect to the freight, some is admitted to be due, as the ship has brought her cargo from Smyrna through much the most considerable part of the voyage. But it is said, that in matters of prize, the whole freight is always given; and for this reason, because capture is considered as delivery, and a captured vessel earns her whole freight. I have already said, that this is not merely or originally a matter of prize. The ship was not brought in as such; she came in first from distress, and was afterwards put upon the proof of her character. It is a case of a mixed nature, and the maxim that

capture is delivery, is not to be taken in the general way in which it has been laid down. It is by no means true, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject [ \* 292 ] him to the payment of the \* full freight. But if ship and cargo, being both neutral, are restored, the consequence is only that the ship must proceed on and complete her voyage before she can demand her freight. If the cargo is restored whilst the ship continues under detention, still less reason is there to contend that she has earned her whole freight. Such is the present case, in which the ship has failed in her contract, and this is not owing to the cargo in any manner, but to her own state of distress originally, and afterwards to her dubious character. Under these circumstances it is impossible to say that she has earned more than a freight *pro rata itineris*, which therefore the registrar and merchants must ascertain in the usual manner.

3rdly. As to the *quantum* of the demand of the owners of the three vessels, it is not denied that they were hired and occupied for a long time as warehouses; and it is no slight circumstance that the cargo was put on board in some degree against the inclination of the owners; they were almost impressed as it were into the service. The cargo consisted partly of damaged cotton, and the very stowage occasioned some degree of damage to the ships. Still farther damage was sustained from the delay of quarantine, to which the cargo was necessarily subjected as coming from the Levant. The master of The Copenhagen entered into a written contract with the owners of the three vessels; and I think the master had a right, under such circumstances of necessity, to bind both the owners of the ship and cargo in acting for their service. For a master, under circumstances of necessity, has a general right to hypothecate either of them, [ \* 293 ] or to sell the cargo, or to throw any \* part of it overboard.

There has been a proposal made by the parties to refer the *quantum* to the registrar and merchants. This is what I shall do, intimating only my opinion, that if the written contract is not impeached by fair imputation of negligence, or treacherous abandonment on the part of the master, or by that of gross extortion on the other side in an hour of distress, it is binding on the owners, and ought to be maintained to its full extent.



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The Copenhagen. 1 C. Rob.

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4thly. When a ship having sustained damage at sea, comes in for repairs, and becomes unfit to perform the function for which she is engaged, to contain and to convey the cargo. That in such a case the owners of the ship should claim the expenses of repairs from the owners of the cargo, and at the same time refuse to pay any part of the charges of transshipping and conveying the cargo, would be very unreasonable. The expenses, severally, may be matter of simple average, or the whole may be matter of general average. General average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. Simple or particular average is not a very accurate expression, for it means damage incurred by, or for, one part of the concern, which that part must bear alone; so that in fact it is no average at all, but still the expression is sufficiently understood, and received into familiar use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; \* and there [ \* 294 ] might be a simple average for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as if a water spout should fall on a cargo of sugars, and a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both. In this case the transshipping, or rather the unloading of the goods, seems to have been for the common benefit of both; for it was necessary to unload the ship, as well for its own repair, which was become indispensable, as for the preservation of the cargo; and, therefore, the expense of that transshipment, or rather of the unloading, seems to have upon it the character of a general average, though, possibly, it may be hardly worth while to consider the unloading as a charge distinct from the transshipment, and if so, it should seem to belong to the cargo only. The expense of conveying the cargo to its ultimate destination belongs to the cargo only, the contract having been in effect determined by the payment of freight *pro rata itineris*. As to the expense of the repairs, I think that there is no ground to charge the cargo with that; for the reason, that the ship and the cargo being completely separated by the determination of the contract, and new vehicles provided at the expense of the cargo, the cargo is not answerable for those repairs which it in no degree occasioned. This is what occurs to me upon the view of the matter. It has been inti-

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The Copenhagen. 1 C. Rob.

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ated that there is a general rule prevailing in such matters among those most conversant in them. If there is any thing like a law merchant on this subject, I should be very unwilling to shake an established rule on mere speculation; and I shall, therefore, refer it to the registrar and merchants to inquire respecting the existence of such a rule of practice; and if they are satisfied that such a rule exists with a generally received authority, to apply it in ascertaining the burdens that lie respectively upon the ship and upon the cargo, subject to the farther opinion of the court.

The registrar and merchants reported, that the amount of the sum to be allowed for the hire of the vessels, ought to be paid by the owners and claimants of the cargo, at the following rate:

	£.	s.	d.
For the sloop William, 85 tons, for 39 weeks,			
at 5 <i>l.</i> per week . . . . .	195	0	0
For the brig Adventure, 160 tons, for 41 weeks,			
at 10 <i>l.</i> per week . . . . .	410	0	0
For the sloop Susannah, 65 tons, for 41 weeks,			
at 4 <i>l.</i> 4 <i>s.</i> per week . . . . .	172	4	0
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	£777	4	0

They were further of opinion not to allow interest on the above sum; conceiving it to be a sufficient compensation to the parties.

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[\* 296]      \* THE EMANUEL, Soderstrom, master.

April 9, 1799.

Freight refused to a neutral ship carrying salt from one Spanish port to another.<sup>1</sup>

THIS was a case respecting the allowance of freight and expenses to a neutral ship, taken carrying on the coasting trade of the enemy.

#### JUDGMENT.

SIR W. SCOTT. This is the case of a ship sailing under Danish

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<sup>1</sup> [See *The Atlas*, 3 C. Rob. 304*n*; *The Rebecca*, 2 C. Rob. 101 and note; *The Allegoria*, 4 C. Rob. 202*n*; *The Ebenezer*, 6 C. Rob. 256; *The Commercen*, 2 Gall. 364, and S. C. 1 *Wheat* 382; *The Ann Green*, 1 Gall. 289.]

colors, and taken with a cargo of salt, on a voyage from Cadiz to Castropol in Gallicia. The ship has been restored, reserving the question of freight and expenses. The cargo has been condemned as the property of the king of Spain, and the question now is, under these circumstances, Whether freight and expenses shall be allowed in this case?

I shall, first, consider this case upon principle; and secondly, upon the foundation of authorities.

First. Where a capture is made of a cargo, the property of an enemy, carried in a neutral ship, the neutral ship-owner obtains against the captor those rights which he had against the enemy. At the same time this principle is not so universal as not to be liable to some exceptions; as, for instance, in the known case of contraband goods.<sup>1</sup> If an enemy puts on board a neutral vessel a cargo belonging to himself, which is a contraband cargo, and that cargo is taken, it is condemnable to the captor; but the court will not consider itself as bound to enforce the payment of freight, against the captors, although, at the same time, the neutral ship-owner might have just \*reason to demand it from the enemy, with respect to whom [\* 297] his contract has been performed, as far as he had not been disabled from fulfilling it by the very circumstance of the other contracting party having put a cargo of that species on board, and consequently exposed the vessel to hostile seizure; and the court may, in like manner, not conceive itself under any obligation to say, in other instances, that the captors are liable to the charge of freight, although it may be a good and valid demand against the owner, which the parties must settle elsewhere.

Now, the ground upon which it is contended that the freight is not due to the proprietors of this vessel, is, that she is a Danish ship employed in the transmission of Spanish goods, from one Spanish port to another, and so carrying on the coasting trade of that country. In our own country it has long been the system, that the coasting trade should only be carried on by our own navigation. I observe, that in all the rage of novel experiment that has dictated the commercial regulations of France in its new condition, this policy is held sacred; it stands enacted, by a decree, 21st September, 1793, that no goods, the growth or manufacture of France, shall be carried from one French port to another, in foreign ships, under pain of confiscation.<sup>2</sup> The same policy has directed the \*commer- [\* 298]

<sup>1</sup> [The Mercurius, 1 C. Rob. 288; The Jonge Jacobus Bauman, 1 C. Rob. 248; The Ringende Jacob, 1 C. Rob. 89; The Neptunus, 3 C. Rob. 108.]

<sup>2</sup> Les Bâtimens étrangers ne pourront transporter d'un port Français, à un autre port

cial system of other European countries; in the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade. I think, therefore, the *onus probandi* does at least lie on that side, and always makes it necessary to be shown by the claimants, that such a trade was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question, but that it was a common and ordinary trade, open to the ships of any country whatever.

Applying that principle to the present case, (if I am right in the presumption,) I am to infer, that this vessel is carrying on a commerce which, according to the general trading system of Spain, she could not pursue, in consequence of the pressure to which the commerce of Spain has been reduced by the arms of this country; if so, upon what ground is it that she claims freight against the captor on a voyage undertaken for the peculiar accommodation and relief of the enemy, under the distress to which the successful hostilities of the captor's country had reduced him? Is there nothing like a departure from the strict duties imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that

pressure which it is the very purpose of war to inflict, in [ \* 299 ] order to compel the conquered to a due sense and \* observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship is taken in an office of this kind, she is entitled to claim against the captor, whom she is thus counteracting and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance?

It is said in argument that this principle, which applied likewise to the colonial trade between the mother countries and their plantations in the West Indies, (that being equally a trade guarded by a monopoly in time of peace, and having been likewise occasionally relaxed under the pressure of a war,) has been in a good measure abandoned in the decisions of the Lords Commissioners of Appeal. I am not

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Français, aucunes denrées, productions ou marchandises des cru, produit, ou manufactures de France, colonies ou possessions de France, sous les peines portées par l'article 3 Loi contenant l'acte de navigation, 21st Septembre, 1793, (i. e. confiscation des bâtimens et cargaison & de 3000 liv. d'amende, &c.)

acquainted with any decision to that effect; and I doubt very much whether any decision yet made has given even an indirect countenance to this supposed dereliction of a principle apparently rational in itself, and conformable to all general reasoning on the subject. It is certainly true, that in the last war many decisions took place which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce. But under what circumstances? It was understood that France, in opening her colonies during the war, declared, that this was not done with a temporary view, relative to the war, but on a general and permanent purpose of altering her colonial system, and of admitting foreign vessels universally and at all times to a participation of that commerce. Taking that to be the fact, (however suspicious its commencement might be during the actual existence \* of a war,) there was [ \* 300 ] no ground to say that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged. And therefore, in the case of *The Verwagtig*,<sup>1</sup> and in many other succeeding cases, the Lords decreed payment of freight to the neutral ship owner. It is fit to be remembered on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of a war; for hardly was the ratification of the peace signed, when she returned to her ancient system of colonial monopoly. In the present war, I am not aware that any judgments of the Supreme Court yet pronounced, have receded from the principle, except in cases, and under circumstances in which a respect to public stipulations and treaties required that the application should be limited; the general principle I take to be entire and untouched, as far as it relates to that trade of the colonies.

As to the coasting trade, (supposing it to be a trade not usually opened to foreign vessels,) can there be described a more effective accommodation that can be given to an enemy during a war, than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing any \* thing new into the country, and it certainly is not; [ \* 301 ] but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off

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<sup>1</sup> Lords, February 28, 1786. This was a Danish vessel, bound from Marseilles to Martinique, and back to Europe, and taken on the outward voyage; the Vice Admiralty Court of Antigua had given half freight; on appeal the Lords gave the whole.

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The Emanuel. 1 C. Rob.

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all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life, in this metropolis; is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of an actual military assistance in the war? What is the present case? It is still more—it is the direct conveyance of a commodity belonging immediately to the king of Spain, for the purpose of public revenue. The vessel is employed not merely in the private traffic of individuals, but in the revenue service of the State. The king of Spain, disabled from employing Spanish vessels in the collection of his revenues, enlists foreign vessels under this necessity. Salt is a royal monopoly in Spain, as it formerly was in France; and it is distributed on the government account to the various provinces. This foreign ship is employed in the distribution, and by the employment becomes an actual revenue cutter of the king of Spain. It should seem to be no very harsh treatment of such a vessel, if, on the capture, she is restored, and is only left to pursue her demand of freight against her original employers.

With respect to authorities, it has been much urged, that in three cases this war, the Court of Admiralty has decreed payment of freight to vessels so employed. And I believe that such cases did pass under an intimation of the opinion of the very learned .[\* 302] \* person who preceded me, in which the parties acquiesced without resorting to the authority of a higher tribunal. But a case before the Lords seems to convey a different opinion upon this subject of the coasting trade of the enemy,—the case of *The Mercurius*,<sup>1</sup> in which freight was refused. The cargo was lawful under the Danish treaty, to the benefit of which the party was entitled as *bonâ fide* domiciled in Denmark, although a native subject of Great Britain. I am not able to say precisely how far the circumstance of his birth was an ingredient in the determination of the case. But the general rule is, that a person living *bonâ fide* in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, provided it is not inconsistent with his native allegiance. It is conformable to more ancient judgments upon the subject, which have pronounced that “neutrals are not to trade on freight between the ports of the enemy.” To this principle I shall adhere in the present case, leaving

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<sup>1</sup> Lords, March 7th, 1795. This was a Danish vessel carrying a cargo of wheat from Dunkirk to Bordeaux, and restored by consent, reserving the question of freight. The sentence of the Court of Admiralty refusing freight, was affirmed.

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The Amor Parentum. 1 C. Rob.

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the party to such remedy for his demand of freight as he may think fit to pursue; either against the captor by appeal in this country, or against his freighter in the country where he was employed.

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\* THE AMOR PARENTUM, Henn, master. [ \* 303 ]

April 13, 1799.

A case respecting priority of seizure by non-commissioned persons.

THIS was a question respecting a priority of seizure, by non-commissioned captors.

#### JUDGMENT.

SIR W. SCOTT. The principal question in this case is, Who are the actual seizors? It appears "that the vessel being off Harwich in distress, made a signal for assistance, and on the approach of a fishing smack, the crew declared that the ship was a Hamburger, but that the cargo was French property." This is the master's deposition. And he says, "that he acted so for the purpose of saving his ship, and getting into an English port." The fishing smack brought the vessel into Harwich, and having moored her in such a way as to make it impossible that she should get out again, the master of the boat, leaving one man on board the ship, went to his owner and informed him of what he had done. The owner went immediately to the custom-house, and desired to deliver her up as a droit of admiralty. Then what is there wanting to make a complete seizure? Possession is taken by British subjects on information that it was French property; and it must, therefore, be presumed to have been done with a complete *animus capiendi*. This was evidently the motive of action, for if they had acted only as mere pilots, they would not have left a man on board to keep possession, when every \* thing [ \* 304 ] was safe, nor would they have stationed their own vessel near to keep guard, as it appears they did; nor would they have gone to give information that they had seized a droit of admiralty, as it is proved they did, by the collector.

After all this had passed, an excise-cutter getting intelligence of the state of the vessel, went on board, and made a formal seizure. This must have been a mere idle ceremony; and, indeed, it seems to

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The Carolina. 1 C. Rob.

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have made that impression on the crew of the captured ship. For it is stated in their depositions on the third interrogatory, "that they were taken by those who had left them to give information." For the persons in the excise-cutter to go and take possession afterwards, is arresting a man already in the sheriff's house, and I am surprised that such a claim should be set up.

The value of the goods appears to have been 1,321*l.*, and the number of captors ten, besides the owner, whose boat was staved in the service. I shall give the owner by way of encouragement 100*l.*; 100*l.* to the master; 80*l.* to the mate, who was left on board; and 40*l.* to each man.

[ \* 305 ]

\* THE CAROLINA, Skynner, master.

April 16, 1799.

Silver going from a French port to Hamburg; proof required that it was for cargoes already received.<sup>1</sup>

THIS was a case of a quantity of silver going from a French port to Hamburg.

COURT. This is a claim for a quantity of silver sent from Dunkirk to Hamburg, on board an American ship, and asserted to have been going for the account and risk of merchants of Hamburg. What the court must require is, to be satisfied that it was going in payment for cargoes already received in France. For it is pretty notorious that the French have been in such bad credit during this war, as to be obliged to remit bullion for their purchases beforehand. If that was to appear to have been the case in this instance, the silver must be condemned as French property. Till it arrived, the shipper, I apprehend, would be the loser, and not the consignee; for the contract till the arrival, would be what I should call an executory contract. I do not think it is sufficiently proved that it was sent for cargoes received. It will, therefore, be necessary to see more of the transaction from the correspondence of the parties.

Farther proof ordered on that point.

June 26*th*, 1800. The previous correspondence between the par-

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<sup>1</sup> [The Josephine, 4 C. Rob. 25.]



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The Joseph Harvey. 1 C. Rob.

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ties, respecting cargoes consigned to Dunkirk, was produced in farther proof, and the invoices of those cargoes. It appeared from the correspondence, that the claimant had stipulated for payment, either in good bills on Hamburg, or in bars of silver. The attestation of the surviving partner of the house of trade was also exhibited, swearing to the truth of these facts, and that the cargoes had not been sent or purchased on account of the government of France.

No farther opposition was made on the part of the captors. The silver was restored.

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\* IN THE INSTANCE COURT. [ \* 306 ]

THE JOSEPH HARVEY, Paddock, master.

April 18, 1792.

A petition for salvage on behalf of a pilot, appearing to have advanced false pretensions, and to have misconducted himself, dismissed with costs.<sup>1</sup>

THIS was a case on a petition for salvage.

JUDGMENT.

SIR W. SCOTT. This is a petition praying salvage; and it is said by his Majesty's advocate, that it is impossible for these persons to claim salvage, as there is little more than pilotage due; although it is allowed the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made.<sup>2</sup> It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into a port, under circumstances of extreme danger and personal

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<sup>1</sup> [Cases as to forfeiture of salvage by misconduct, *The Neptune*, 1 W. Rob. 297; *The Black Boy*, 3 Hagg. Ad. R. 386, n.; *The Duke of Manchester*, 10 Jur. 863; S. C. 4 Notes of Cases, 575; *The Dygden*, 1 Notes of Cases, 115; *The Dove*, 1 Gall. 585; *Mason v. The Blaireau*, 2 Cranch, 240; *The Boston*, 1 Sumn. 328; *The Helle Corruner*, 6 Wheat. 152; *The Barefoot*, 1 Law & Eq. Rep. 661; *The Rising Sun*, Ware's R. 378. As to diminution of salvage by misconduct, see *The Prius Frederick*, 2 Dod. 482, note.]

<sup>2</sup> [For cases in which salvage has been allowed to pilots, see note to *The Frederick*, 1 W. Rob 17.]

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The Joseph Harvey. 1 C. Rob.

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exertion, may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor. However, let us look into the circumstances of the case, and see whether there is even that pilotage due; for if the fact be, that this pilot has carried the ship to a port where she was not intended to go, without any necessity for so doing, it is carrying the ship out of her course, and putting the owners to a very great inconvenience, and for which no pilotage shall be due.

The case comes before the court as a case of salvage; and I will take it first upon the affidavits of the asserted salvors, of [ \* 307 ] which I must observe, that they are \* not deficient in exaggeration, but seemed to be touched up with a pretty high degree of coloring. They state, "that about one o'clock upon the 27th of November last, they espied a brig at a distance under a signal of distress; the wind then blowing very hard, and the sea running high; that they nevertheless proceeded to the vessel, though they were, by reason of a very high sea, some considerable time before they could get out to sea," &c. Everybody knows that in acts of pilotage, when the sea runs high, there is some degree of peril attending them; but it is not upon that account that such persons are to be entitled as salvors; it is a hazardous occupation from the nature of it; but having taken up that occupation, and the hazard attached to it, they are not to come before the court to claim extraordinary rewards as belonging to them in consequence of the common perils of that employment which they themselves have chosen.

On approaching the ship, what question did they ask? They did not ask whether she was in a state of particular distress; neither do they say whether there was any symptom of distress about her; but they ask a common general question, "Whether she wanted to go into harbor?" If the ship was in a case of great distress, that would have been a very unnecessary question. They go on to state, "that the deponents were then asked by the master of the ship, if there was any harbor under his lee; and being told of Ramsgate, he waved his speaking-trumpet as a signal for the deponents to come on board; they then lowered their boat's foresail to let the brig come up with them, and on her so doing they attempted to board her on the larboard quarter, but without effect, and were obliged to sheer off."

[ \* 308 ] I fancy that is no \* uncommon occurrence in getting on board a ship that is lying out at sea. They then state the great difficulty and hazard which they encountered in getting on board; but "having got on board, (Mr. Toldridge says,) he agreed with the master to take her into Ramsgate harbor, and the terms

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were to be referred to persons there, conversant in adjusting matters of this nature." Matters of what nature? It does not appear to me that this was any thing more than a common act of pilotage; if there was any thing more done, they do not suggest it in their depositions.

Then upon what ground is it that they claim any thing more than for common pilotage? I think there is no reason whatever that this business should be put upon any other footing, according to their own account of it, than the common scale upon which pilotage is settled. They go on to state "that the helm of the vessel was given up to the pilot, and that she arrived in Ramsgate harbor, about half past three o'clock on the twenty-seventh day of November;" so that according to their own account, it is a very short business. There seems also to be great reason to believe that the weather was not so extremely bad, nor the task so hazardous as they represent it; for the rest of the men appear to have returned in their boat, without danger. They afterwards state, "that the officers of the customs informed the master that the vessel must perform quarantine; and that he said that his vessel was in want of provisions, and could not leave the harbor." It appears, however, that they went out to Sandgate Creek to perform quarantine, and remained there till the 5th of December following, when the deponent and the other persons left the vessel. They say, "when the ship was navigated into Ramsgate harbor the wind blew a very hard gale, and the sea ran very high; and they verily believe, that had it not been for the timely assistance rendered to the brig by the deponents, the master and crew being totally unacquainted with the channel, she would have been in great danger of being lost." But I think there is reason to believe that the sea was not so alarmingly high as they represent; more especially as it is sworn in the affidavit of the other party, "that the wind blew a topsail gale only, being no more than they had been before carrying, and being a very good wind to have brought the brig to anchor in the Downs." And as to the ignorance of the master and crew respecting the channel, that is no more than what is usually to be expected in foreign ships. A pilot is to find local knowledge; in so doing he finds no more than what his duty binds him to furnish; so that taking the matter on their own affidavits, it is a mere ordinary case of pilotage.

Let us see, however, what is the representation on the other side, given by persons present at the transaction, being I think, seven in number. Paddock, the master, says, "that the brig being upon a voyage to the port of London, and being arrived off Dover Castle, he made the usual signal for a pilot, meaning to go to the Downs, and

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afterwards to the River Thames; that in consequence of that signal a boat from Dover came alongside the brig with five men on board, of whom Toldridge, being one, asked him if he wanted a pilot?" (that is exactly the question, and put in the language which the mariners themselves state,) "and where he wished to go in?" to [ \* 310 ] "which the deponent replied, "he did want a pilot to carry him safe into the Downs." Toldridge observed, that the wind blew fresh, and it would be better to go into Ramsgate harbor; but the master replied, he wished to have his vessel carried into the Downs, and that he would by no means have her taken to Ramsgate; that Toldridge then came on board leaving his people in the boat; and addressing himself to him in a low tone of voice, desired to speak to him in private; that they went into the cabin, and then Toldridge inquired of him what situation the brig was in; that he answered the cables and anchors were new; on which Toldridge advised him to take an axe, or let him take axe and cut the strands of the cables, and cut away the sails, or let them blow to pieces, and let go the anchor, that she might be carried into Ramsgate in distress; that he might then make his protest, draw on his owners for 150 guineas, and put 50*l.* of it into his own pocket without injuring his owners, as the loss would fall on the underwriters; or words to that effect." He goes on to say, "that Toldridge then advised him to consult with his mate, as he seemed to be but a young man; and assuring him that it was no uncommon thing for American captains to do as he had proposed; to which the master replied, that he wanted no man's advice on such a subject."

To be sure if this conversation did pass, it is extremely disgraceful; it is language which no court of justice can receive without strong expressions of indignation against the persons using it. It is little less than a proposal to commit an act of piracy and robbery; and for which, if it had been executed, all the parties, had [ \* 311 ] they been brought before \* a court of criminal justice, would have been subjected to penalties which, if they did not affect their lives, might have affected their persons and property in no small degree.

It is said, by the counsel for the salvors, that it was very unlikely that such a conversation should have been held; if it is the practice, as this man is made to say it is, it takes away a great deal of the incredibility of such a conversation. If these things are of so familiar occurrence, it is not very likely that there should be much delicacy observed in making the proposal. But I have not only the assertion of the American master; there are two other witnesses speaking to the same fact. I can have no doubt after this, that such a conversa-

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tion did pass. I cannot involve all these persons in the crime of gross perjury, upon the mere improbability of the thing; when it stands upon the otherwise unimpeached credit of three persons swearing that they heard such a conversation. I am of opinion that this disgraceful conversation is very sufficiently proved; and I fear the practice on which it is founded, and to which it alludes, is much too frequent.

It is stated that the pilot took possession of this vessel. On this fact I must say it does appear extraordinary, that he should have been suffered to take the sole possession of the vessel, and carry her into a port against the inclination of the master; for I see no reason why the master might not have turned this man out of the ship, and called another pilot. I think that he would have protected the owners from some inconvenience in so doing; and I hope an honest pilot might easily have been procured; but I suppose he acted for the best, under the particular circumstances of his situation; [\* 312] and possibly I may not see all the difficulty of procuring another pilot at that moment.

With regard to the course in which the vessel was taken, I presume a ship cannot get round to Ramsgate harbor without passing through the Downs, or being almost next door to them; so that the pilot carries this ship through the exact tract where the master wished her to be moored; and where, as some of the witnesses say, there were ships then lying at single anchor. I think a pilot carrying a ship contrary to the inclination of the master, unless he can show a necessity for so doing, in order to justify such a proceeding, is guilty of a monstrous breach of his duty.

The ship is brought into port; and there another conversation takes place, respecting what is due for the acts of this pilot; and it is agreed to leave it to be settled by merchants resident there; but the collector of the customs and another gentleman, who were the persons applied to, say, that the ship appeared, from what they heard of the matter, not to have been in any distress; and they very severely reprimanded the pilot for having brought her into Ramsgate; and were of opinion, that he was not entitled to any salvage. In every part of this judgment I do most heartily concur with them. - I think it is a claim set up with the most unpardonable effrontery; and I am very sorry that I cannot do more than dismiss this petition with costs, and report the conduct of the petitioner to the Trinity House.<sup>1</sup>

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<sup>1</sup> Cases of salvage, when they are fairly made out, and are not founded on false and fraudulent pretensions, as appeared in this case, are received in the Court of Admiralty with the most liberal encouragement.

In *The Sarah*, February 15th, 1800, which was a case of salvage on the coast by a

[ \* 313 ]      \* THE ADRIANA, Fitzpatrick, master.

April 23, 1799.

A case on farther proof. [Claim rejected.]  
[Farther proof does not open the case to both parties.<sup>1</sup>]

THIS was a case of a cargo on farther proof.

Farther proof being brought in, it was attempted to introduce affidavits on the part of the captors to contradict it, on a suggestion that farther proof opened the case to both parties.

COURT. With respect to plea and proof, this is true, but I do not know that in proof by affidavits, this court, or the lords of appeal have ever laid down such a rule. I understand the rule to [ \* 314 ] be, that farther proof \*by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the court. It is a proper control over the rash or light manner with which the claimants may attempt to pick up something like proof by affidavit. But it is not to be exercised except on special grounds; and only with the leave of the court. I shall therefore hear the cause first on the proof brought in by the claimant.

#### JUDGMENT.

SIR W. SCOTT. This is a case of a cargo of wine and brandy captured on the 30th of May, 1795, on a voyage from Bordeaux to Hamburg.

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boat going out to the assistance of a vessel in distress, the court expressed its opinion as to the rate of rewarding such services, in these terms:—"I do not think that the exact service performed is the only proper test for the *quantum* of reward in these cases. The general interest and security of navigation is a point to which the court will likewise look in fixing the reward. It is for the general interest of commerce that a considerable reward should be held up; and as ships are made to pay largely for light-houses, even where no immediate use is derived from them, from the general convenience, that there should be permanent buildings of that sort, provided for all occasions, although this or that ship may derive no benefit from them on this or that particular occasion; so on the same principle it is expedient, for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and therefore that when they are to be paid at all, they should be paid liberally. It is on these general considerations, and not merely to mete out the payment for the exact service performed in the particular instance, that the rewards should be apportioned in these cases; and it is in this view that I shall always consider them."

<sup>1</sup> [But see *The Schooner Sally*, 1 Gall. 401.]

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The *Adriana*. I. C. Rob.

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The claim is given by Mr. Boland, stating himself to be an American ; but he is clearly not an American by birth, as the master describes him to have been born in Ireland. Mr. Boland's own account of himself does not carry back his connection with America beyond 1784 ; therefore we may be warranted to consider him as a British born subject, emigrating to America after the separation of the two countries.

He says, " that he resided in Philadelphia from 1784 to 1794, when, having made several shipments of American produce to France, and meaning to make others, he thought it material to his interests to be present there, to carry on his mercantile concerns." This is a large and very general description of his business in France. There is no mention of particular business, such as the collecting of debts, or any thing specific ; nor is there any thing to remove a suspicion that his business in France might be in a most intimate manner connected with French commerce. He farther says, " that in November, \* 1795, he went from France to the West Indies, and afterwards to Philadelphia." But he does not specify the extent of his visit to the West Indies, nor whether it was to a French island or not ; if so, there would be nothing in this visit to disconnect him from France, and he must be considered in the same light as if he was still resident there. There is no proof or mention of his house of trade in America, nor any circumstance pointing to a continuance of his connection with that country, except one, collected by his counsel from the accidental mention of another ship, coming for his account with a cargo of rice and tobacco from America to Europe. But this might be an adventure having its origin in France ; and at any rate it is not sufficient to support the inference that he still continued to trade as an American merchant. He says, " in August, 1796, he returned to France to collect large sums owing to him ;" but he does not say, that he had no other business than to collect his debts ; but, " that he had no other business than what related to his mercantile concerns." Nor has any one else who settles in the enemy's country as a merchant. What sort of an account is this ? or in what way is it incompatible with the suspicion, that he was become a general trader of that country ?

He does not even state an intention of returning to America. It is impossible, therefore, to consider him as a pure American on this proof ; and if this was the whole of the case, I should think it great lenity to allow him to give a farther account of his national character. The original act is not a shipment made of American produce, nor with a destination to America ; but it is a shipment from France to another \* country of Europe ; it is an original [ \* 316 ]

## CASES DETERMINED IN THE

The *Adriana*. 1 C. Rob.

venture, not springing out of any antecedent transaction, in which the party could be considered as an American; and in short, is as much a French concern as if it was conducted by a French merchant. Under these circumstances Mr. Boland would find it very difficult to sustain his American character; and I should be strongly inclined to hold that in this individual transaction, he is to be considered as a Frenchman. But the use which I shall make of his residence in France, will be to see how it bears upon the *bond fides* of this transaction.

It is hardly necessary to observe, that the transactions of neutrals, resident in France, are, from the very nature of their situations, liable to great suspicions. They are exposed to great temptations from French merchants, who, lying under an inability to export their own produce, will assail them with great inducements to cover and protect their trade. The opportunities and facilities of doing it, when parties are on the spot, are innumerable; and that they should not use them; is rather more than we can expect from the virtue of mankind, which is, on this subject, we know, peculiarly frail and vulnerable. It will be necessary, therefore, for the court to scrutinize all such claims with the minutest attention; and to expect, not indeed a mathematical demonstration, but a strong and fair moral probability, that the transaction is such as it is represented to be; otherwise, if this cannot be shown, the presumption will lie very strong, on the other side, that it is a fraudulent case.

[ \* 317 ] \* The witnesses who have been examined are three, the master, the mate, and one mariner; and it is said, the master speaks fully to the property; but I think, that is not the fair result of his evidence, for it seems to me that it is impossible, from his own account, that he could believe this cargo to be the property of the claimant. If it were really so, there is reason to presume the master must have been fully apprised of it, for he is doubly connected with the owner in this case, as being his countryman, an Irishman migrating to America, like himself, as well as being the person under whose care this valuable cargo was placed.

Mr. Boland must have known that it would be prudent to have a cargo of this nature, being a cargo sent from a belligerent country to another European port fully documented. And by fully documented I mean that there should be the regular papers, supported by the knowledge and testimony of the master. Now, what is the master's evidence? To the 12th interrogatory he says, "he believes Boland is the lader and owner." But it appears that Boland was not the lader, by the agreement, "that Corbeaux was to lade the cargo on account of Boland." And as to the ownership, the master



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afterwards, "that the goods were to be delivered at Hamburg, but for whose account he does not know, and cannot farther answer." And on the 20th, when he is asked whose property it would be if landed, he refers only to his former deposition, and farther cannot answer. So lightly then does he speak, and by reference only to his former account, of which the effect is, in my opinion, nothing. So much for his belief.

\* Then how has he conducted himself, and how do his [\* 318] acts show that he was impressed with a serious belief that the property belonged to the claimant?

The first step would naturally have been to have given a claim; and so he does, for the ship, in June. That he should neglect the cargo, if he knew it belonged to Boland, is highly improbable; but from the 30th of May to the 2d of September no claim is given for the cargo, and then it is given by a merchant of this town. There are also letters of the master utterly inconsistent with his belief that Boland was the owner of the cargo, for he writes, not to Boland, but to Mr. Corbeaux at Hamburg, the consignee, stating, "I have taken all necessary steps for the safety of the ship and cargo, as far as I could with propriety." Yet he had given no claim for the cargo. He then says, "I have little doubt if the claimant comes forward he may have restitution." This is an extraordinary expression, and applicable to a person who was to be brought forward to claim, but in no sense natural to be used for the proprietor. He goes on, "I would wish to know your friend here, that I may proceed; I have done all I could, and have had my counsel's opinion," &c. Am I to understand then, that his counsel advised him not to claim? or what is the result? Looking at the infirm way in which he deposed in his examinations, and the style of these letters, and seeing that he abandoned the cargo, in some measure, by not claiming, I am persuaded he could not seriously consider Boland as the owner of this cargo, but as a person to be brought forward to claim as an ostensible owner, whilst the property actually belonged to the person to whom he was writing, or to their connections.

\* The second witness knows nothing. But the third witness, the mate, says, "the stower of the cargo told him that the owners of the cargo were merchants at Bordeaux." And his language, I must observe, is not the language of a forward witness. It is attempted now to contradict this account in a very singular manner, on the declaration of this stower, not on oath. The very form in which this is introduced, satisfies me that the mate gave a true representation of the discourse between them.

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The Adriana. 1 C. Rob.

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Among the papers, there was a bill of lading, and an invoice, which may occur in any case, false or fair. But there is, besides, a letter, which I think very material to show the true character of the transaction. It is a letter from Mr. Boland to the consignee, dated May 15th, 1795, in these terms, "I send you the invoice, and refer you to my former letters of the 2d and 8th. Should the vessel arrive before me, you will make the speediest sale of the wine, but stow the brandy till my arrival." Then, if this is a true letter, he was to go after his cargo (meaning, as appears, to set off by land on the 20th of May,) and to be the consignee of his own cargo; only on the contingency of his not arriving, his correspondents at Hamburg were to manage the plan of the voyage, as to the wines. But at all events he was undoubtedly to dispose of the brandy himself, for no directions are given, except as to the wine.

This was the state of the case on the first hearing. I will now consider the papers since brought in. There is first an attestation of the owner as to his national character, which leaves that character very uncertain in point of law, and open to great suspicion [ \* 320 ] \* on the fact. The attestation also states, "that he purchased these goods of Mr. Corbeaux, and paid for them 11,000*l*. sterling, by bills of exchange on Hamburg. On this it has been observed, and I think there is a good deal in the observation, that it was extraordinary that he should pay merchants in France with bills on Hamburg, having at the same time large sums owing to him in France and none in Hamburg, as it seems that his bills on Hamburg were purchased in the market. There is a certificate from a notary, stating, "that he had called at the house of the merchants on whom the bills were drawn and found them accepted and paid." But still there is no proof that they apply to this transaction, nor do I see that they were in any way connected with this bargain. There is besides a letter of the 23d of June from Mr. Corbeaux at Hamburg, to Mr. Boland in France, inclosing the master's letter, and informing him of the capture, to this effect: "This business concerning you, we cannot take any steps without your directions." And in consequence of this letter, a claim was afterwards given in, but so late as September. Among the farther proof there is a letter from Boland to Corbeaux previous to the shipment, directing an insurance "as interest may appear;" but there is no word of communication or instructions on any other point. The whole is a most puerile correspondence to be sure, more particularly if we consider that it is the first introduction of Mr. Boland to these parties. There are no accounts, and no chain of correspondence exhibited. The first letters are of the 2d and 8th of May, and the last of the 15th.

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The Thomas. 1 C. Rob.

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\* Now, the first fact that I looked for in Mr. Boland's [ \* 321 ] attestation, was to find what prevented his intended journey to Hamburg. This intention was strong and immediate, as mentioned by himself, five days only before the day on which he was to have set off, and yet no notice is taken of this alteration. The capture could not have prevented it, for he mentions this intention so late as the 15th of May, meaning to set out on the 20th, but the capture was made not till the 30th. Here then is an abandonment of the ostensible scheme, for which no reason is given. On the contrary, Mr. Boland, in his attestation, speaks of Corbeaux as his consignee, in the usual way, without mentioning any thing of his own intention to follow his cargo.

Under all these circumstances, when I see that it was a transaction begun in an enemy's country, and that Corbeaux was the lader; when I consider the nature of the cargo, and the use made of such articles, as articles put under particular requisition by the French government; when I look at the conduct of the master in abandoning the cargo; and when I see the suspicions suggested by the terms of the letter, "that Boland was rather to be considered as the claimant than owner;" I think myself justified in coming to a conclusion, that this is not the property of Boland, but of Corbeaux, or other Frenchmen, and as such I shall think myself warranted to pronounce it subject to condemnation.

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\* THE THOMAS, M<sup>r</sup>Quay, master.

[ \* 322 ]

April 25, 1799.

A monition prayed to detain a ship coming into the port of Liverpool, for adjudication, on the claim of the former British owner, suggesting that she had been a slave ship, seized by the slaves, retaken by a British frigate, and illegally condemned, under a decree of an unauthorized Court of Admiralty at St. Domingo; and under such condemnation sold to the present holder.<sup>1</sup>

THIS was a British slave ship seized by the slaves on board, and afterwards retaken by an English frigate, The Thames, Captain Lukyn. She was carried to St. Domingo, and there condemned

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<sup>1</sup> [Sales under a condemnation while the ship was in a neutral port, have been upheld. The Henric & Maria, 4 C. Rob. 43; The Comet, 5 C. Rob. 285.]

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The Thomas. 1 C. Rob.

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under a decree of a pretended Admiralty Court, erected there without proper authority, and sold. The ship having since come into the port of Liverpool, an application was now made on the part of Mr. Clerke, of Liverpool, the former owner, for a warrant to detain her.

Against the petition, the *King's Advocate*, contended, that although the Admiralty Court of St. Domingo was not legally constituted, and though the sentence was consequently irregular, yet since the proceedings of sale had been so public, the court would not take the vessel out of the hands of a *bonâ fide* purchaser, especially as Captain Lukyn had received only one eighth as salvage, leaving the rest in the hands of the marshal of the court of St. Domingo.

Court. This is a public purchase without doubt, but under a court which had no jurisdiction. The proceedings, therefore, are not only irregular, but null and void. It concerned the purchaser to look to that as well as the seller. The question is, whether I shall send the purchaser or the original owner to the captor? for I will not send either of them to hunt after the pretended marshal of this pretended court. What is proposed by the monition?

[It was answered, to keep the ship in the custody of the court during the suit.]

[\* 323] \* She will then be unemployed. I think it will be better for the present holder of the vessel to give bail. I shall grant a monition to that effect; and with respect to Captain Lukyn, I shall allow him a reasonable time to extend his protest, and then to defend himself. The chief difficulty will be with the ulterior part of the case; what is to be done for the present holders, if it shall appear that they have purchased for a fair consideration?

*April 15, 1801.* This ship was decreed to be restored to the former British owner, paying salvage, as in a case of recapture. The circumstances attending the recapture were of a particular nature, and will require to be fully stated as a distinct case in a future number.

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The Einigheden. 1 C. Rob.

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## THE EINIGHEDEN, Molsen, master.

April 30, 1799.

A case on farther proof — restored.

THIS was a case of farther proof respecting a cargo of deal planks, and unwrought iron, taken on board a Danish vessel, on a voyage from Riga to Leghorn.

## JUDGMENT.

SIR W. SCOTT. This was a Danish ship laden with unwrought iron and planks ; commodities, which, by compact between Denmark and this country, are not contraband. This is a very material circumstance in the case. It is besides of great consequence, as to the proof of ownership, that both the master and the mate, in that part of their depositions which respected the property, denied a French interest. But doubts have arisen on the question of destination, whether it was to Leghorn or to a French port. Had the cargo been contraband, this would have been a most material inquiry. [ \* 324 ] It is on the 12th interrogatory that the doubt first arises, in answer to that the master says, "the cargo was consigned to merchants at Leghorn, whose names he does not recollect, but they appear by the ship's papers," as undoubtedly they do ; but he adds, "the destination was either to Leghorn, or to some port of France ; as he should think proper." Afterwards, to another interrogatory he speaks more particularly, and says, "the ship was chartered for Leghorn ; but directions were given to him to go to Brest, or to any port in the Bay of Biscay." This is not very consistent with his other account. He says besides, "that if he went to France, he was to receive five per cent." But by accepting such an offer, he discredited himself ; for by deviating from his charter-party, he would expose the property of his owner to jeopardy from British cruisers. The mate, who, we might suppose, would know something of such an alternative destination, contradicts it, and says, "they were bound positively for Leghorn." It became however necessary to clear up the doubt arising on the destination. On that point, there is now brought in the claimant's attestation in which he speaks fully as to the property ; and asserts, "that no authority was given by him, or by any other person, with his knowledge, to go to France." It is said there are thirteen other ships spoken of as belonging to the same proprietors, and going with a similar destination ; and that it was therefore reasonable

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The Jefferson. 1 C. Rob.

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to expect a correspondence of a very extensive kind with Leghorn. It might be reasonable to expect it, if the destination of the other ships had been previous to this capture. But if not, he need [ \* 325 ] not, I think, have entered into all the particulars \*relating to them; and in respect of some of these vessels, the destination appears afterwards to have been changed.

Directions are said to have been given to the master, "in passing the Sound to apply to the Swedish consul for papers;" but not for any thing more, as I understand it, than mere formal papers. The consul has been examined on this point, and contradicts the master most absolutely, as to any directions said to have been given by him; and states the destination to have been unequivocally to Leghorn.

As the property is fully proved, the destination is become of less consequence. I do think the master has so discredited himself, that little reliance can be placed upon him; and as the declaration of the Swedish consul is so express, I shall not think any farther proof necessary.

It was prayed that the claimant might be allowed his expenses.

Court. No; there was no reason for that; there was sufficient need of farther proof.

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THE JEFFERSON, Dennis, master.

May 9, 1799.

After a restitution *in solidum* to a house of trade in America, a prayer by the assignees of one partner become a bankrupt in this country, for severance of his share and payment to them, refused.

THIS was a petition on behalf of the assignees of a bankrupt, who had received restitution jointly with other partners on a former day; praying that a severance might be made as to his share, and that it might be directed to be paid out of the registry to the assignees.

[ \* 326 ] \* For the petition, *Arnold*. Contended, that the assignees were the legal representatives of the bankrupt; and as such entitled to demand his share of the property already restored by a decree of the court. That, as the decree had passed in form to the

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The Jefferson. 1 C. Rob.

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party, if the court should think it more regular to rescind that form in the first instance, a motion would be made to that effect; but it was apprehended the assignees were as much the legal representatives of the party, as his executors would be if he were dead; and therefore entitled to demand payment of his share under the decree which had already passed without any violation of the forms of the court.

On the other side, the *King's Advocate* contended, that this was an attempt to get possession of the property of the house of trade in America, which the assignees could not be entitled to, till all the creditors of that house were satisfied, and more especially those who had a particular lien on this cargo; that although the Court of Admiralty will distinguish between neutral and hostile characters, as far as it is necessary for the purposes of restitution, it will not go farther; and no instance has been produced in which this court has ever interfered to make a severance between parties all neutrals.

#### JUDGMENT.

SIR W. SCOTT. I thought at first that this question had arisen on the reserved share of that partner, whose national character has not yet been satisfactorily made out to the court; but now, understanding that the share of this bankrupt was amongst the property restored to the house of trade in America, I can have no [\* 327] doubts.

The proceedings have been these: the whole claim was made on behalf of the house in America, and three fourths were restored as claimed; had the fourth share been the bankrupt's, I should have thought the claim of the commissioners very strong; and I should have seen no objection to restore to them instead of the bankrupt, for I accede to what has been said of the representative character of the assignees. But these assignees are not before the court as claimants; they might have appeared, and have given their claim; they have not done this, and restitution has already passed *in solidum* of three fourth parts of the property claimed to the members of this house.

The question then is, whether the court shall proceed again to make a severance between these parties? I cannot think that I have the power to do that; all the severance that was necessary in this case to determine the national character of the parties, has been already made; restitution stands decreed to this house. I am *functus officio*, and I shall not begin again at the prayer of the assignees, who now suggest, that one of the partners is likewise an English merchant, and a bankrupt. They must resort to some other authority, to make

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The General Walterstorf. 1 C. Rob.

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the discrimination between this American partnership stock, for the purpose of subjecting a particular share to a British bankruptcy. It is no part of the duty of the Court of Admiralty to do this; and I dismiss the petition.

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[ \* 328 ] \* THE GENERAL WALTERSTORF, Thaarup, master.

May 9, 1799.

A monition to arrest certain goods as prize goods (not in the hands of the captor, and not fully identified) refused.

In this case *Laurence* moved for a monition on the part of original owners to arrest certain goods lying in a warehouse, on suggestion that they were part of the cargo of The General Walterstorf, captured by The Stork in the West Indies, and illegally condemned in a self-constituted court at St. Domingo. It was insisted that the identity of the goods was sufficiently proved by the description given of them by the party advertising them for sale, "as a quantity of tobacco, being part of the cargo of The General Walterstorf, and taken by The Stork in the West Indies."

Court. It does not absolutely appear that the ship is the same. When goods are held for the captor, it is usual to proceed in this way; but I do not choose to seize goods in this manner at once when they are in the warehouse of another person, and may have undergone a conversion by a fair sale. I am not disposed to grant this monition now. The claimant must first proceed against the captors. They are responsible to him in the first instance.

Monition not granted.<sup>1</sup>

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<sup>1</sup> The registrar observed, that there had been no monition against the captors to proceed to adjudication; that it appeared to him that in regular practice that should first pass, and then the claimant might proceed on the intimation.



• THE JONGE TOBIAS, Hilken, master. [• 329]

May 10, 1799.

Contraband articles, unclaimed, but appearing by all the ship's papers to belong to a part-owner of the ship, held to affect his share of the vessel.

THIS was a case of a ship taken on a voyage from Bremen to Rochelle, laden with tar. The ship was claimed for Mr. Schræder and others; the tar remained unclaimed.

The *King's Advocate* and *Croke* contended that the cargo was undoubtedly subject to condemnation, as contraband. That the ship's papers all described the cargo to be the property of Mr. Schræder, the principal claimant of the ship. That the master stated "Mr. Schræder to be the lader and the owner;" and that there was a bill of lading and certificate of property on oath to the same effect. That on these grounds there was sufficient proof of the property of Mr. Schræder, although he had withheld his claim, knowing it would affect the ship. That notwithstanding this artifice the same consequence would follow, as there was sufficient proof of property, and that the whole was liable to condemnation; his own share, as being connected with his other property employed in contraband trade; and the shares of his copartners, as affected by the act of their partner and agent; the passport particularly purporting to have been obtained by Mr. Schræder, on oath that the cargo contained no contraband goods.

JUDGMENT.

SIR W. SCOTT. There can be no doubt in this case but that the tar is liable to condemnation as unclaimed, and also as contraband, being taken going from a port of the country of which it could not be the produce. Formerly, according to the old practice, this cargo would have carried with it the condemnation of •the [• 330] ship, but in later times this practice has been relaxed, and an alteration has been introduced which allows the ship to go free, but subject to the forfeiture of freight on the part of the neutral owner. This applies only to cases where the owners of the ship and cargo are different persons. Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for where a man is concerned in an illegal transaction, the whole of his property embarked in that

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The Anna. 1 C. Rob.

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transaction is liable to confiscation.<sup>1</sup> The proofs are very strong that Mr. Schræder is the owner of the cargo, although it is not claimed. There is the sworn certificate of the man himself; and all that is said on the other side is, that there is no claim. There may be cases in which the conduct of a man may prevail against the evidence of the ship's papers, but there is here only a continuance of the same fraudulent discretion which has guided his conduct throughout, as he must be aware that an acknowledgment of the fact by claiming would involve the ship. His share must be subject to condemnation.

The only question is, whether there is proof that there are more owners of the ship than one. I think it does appear that there are other persons concerned in the ship, although they do not appear to be affected with a knowledge of the cargo. The presumption is against them certainly, but that is not sufficient to induce me to go the length of condemning their shares. What I shall do will be to condemn Mr. Schræder's share, and require an attestation of the other part-owners that they had no knowledge of the contraband goods, for being only part-owners of the ship, and not general partners with Mr. Schræder, I shall not hold them to be necessarily affected by his criminal acts.

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[ \* 331 ]

• THE ANNA, Beer, master.

May 21, 1799.

(A Motion for the Examination of a Witness.)

IN this case an application was made on the part of the claimants for the examination of a witness produced by them. The circumstances were: two days after the vessel came into port, a man produced himself as supercargo, and offered papers in his possession. The commissioners refused to examine him, and it was for the benefit of his evidence that the motion was now made.

COURT. If the affidavit had stated the papers to have been offered immediately, and refused, I might receive these papers, but as it now stands, I shall not direct them to be received.

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<sup>1</sup> [See note to The Ringende Jacob, 1 C. Rob. 89, 91.]

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The *Betsy*. 1 C. Rob.

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## IN THE INSTANCE COURT.

(A Motion on a Ship Unknown.)

On contempt. Monition to show cause.<sup>1</sup>

IN this case, the *King's Advocate* stated, that after the ship had been taken possession of, under warrant of the admiralty, as derelict, and the cargo had been put into a warehouse by the agent of the admiralty, the warehouse had been broken open, and the cargo taken out and sold. On these facts he prayed, that an attachment might issue against the parties, and that they should be directed to produce an account of sales. The registrar, being consulted, said he had not met with any case exactly similar; that the usual practice, was not to arrest in the first instance, although there was no doubt of the power; as in cases of wearing illegal colors, the first step was usually to grant a warrant to attach the person, grounded on an affidavit of the fact. Precedents were directed to be con- [\* 332] sulted. On the 24th May, the court said, "I have considered this matter, and decree a monition to show cause why an attachment should not issue for contempt."

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THE BETSEY, Goodhue, master.

May 24, 1799.

**Blockade.** Inquiry at the mouth of the harbor as to the continuance of the blockade; under what circumstances allowed.<sup>2</sup>

THIS was a case of an American ship taken by the French, on a voyage from America to Amsterdam, retaken by the English, and proceeded against for an intentional breach of the blockade of Amsterdam.

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<sup>1</sup> [See *The Bure*, 1 Law and Eq. R. 676.]

<sup>2</sup> [The *Little William*, 1 Acton, 141; The *Spee*, 5 C. Rob. 76. As to contingent destinations, see The *Spee*, 5 C. Rob. 76, note. For treaties respecting blockades, see The *Spee*, 5 C. Rob. 80, note.]

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The Betsey. 1 C. Rob.

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For the captors, the *King's Advocate*. There seems to be no reason to question the property in this case, but every paper on board points to a destination to Amsterdam. It is proved also, by the instructions given to the master, that the owner was perfectly aware of the blockade of Amsterdam. They direct him, "If you should not be so fortunate as to get into Amsterdam, owing to the English ships still keeping up the blockade, which you will know by speaking those which lie off, you may go to Hamburg." It appears by these instructions, that the information was to be sought for only at the entrance of the harbor, which is not to be held up as a measure of candid inquiry, as it gives the party the utmost latitude of eluding the British cruisers on that station; and was rather a guarded expedient of fraud, than a fair alternative destination. If they really wished for information, the master should have been directed to call at some British port.

To allow neutrals to go to the very mouth of the Texel is [\* 333] opening the door to great \* frauds. There are, besides, no instructions to consignees at Hamburg; therefore, there is reason to believe that this part of the instructions to the master was merely colorable. On these grounds it is submitted, that this ship was subject to condemnation from the moment of sailing on this destination.

For the claimants, *Laurence*. The material circumstance that distinguishes this from some other cases, is the distant residence of the owners, which made it necessary for them to give discretionary orders of this kind, as they could have no immediate knowledge of ceasing of the blockade, whenever that might happen, and must, therefore, without such provisional orders, be thrown considerably behind the rest of the world in their commerce to that port, when it should be again opened. The alternative instructions were therefore necessary, and nothing has appeared in any part of the case that, in any way, exposes them to the imputation of fraud. There was no actual attempt to evade the blockade, as the ship was taken by the French before she had made half her voyage, and recaptured by a British cruiser off Bordeaux. The alternative destination is still less liable to exception as a colorable destination. The cargo consisted of rice and tobacco, which are articles of a general merchantable nature, adapted to all markets. There is nothing pointing exclusively to Amsterdam, more especially if the ulterior purpose of this voyage is considered, which was to have proceeded to Russia, after having obtained letters of credit for that market.

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The Betsey. 1 C. Rob.

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## JUDGMENT.

SIR W. SCOTT. I hardly think that there is sufficient evidence in this case to affect the parties with an \*intention of [ \* 334 ] fraud. The ship sailed in January last, when the owners were certainly informed of the blockade ; but the distance of their country is a material circumstance in their favor. I certainly cannot admit that Americans are to be exempted from the common effect of a notification of a blockade existing in Europe. But I think it is not unfair to say, that lying at such a distance where they cannot have constant information of the state of the blockade whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule which justly obtains in Europe, that the blockade must be conceived to exist, till the revocation of it is actually notified.<sup>1</sup> For if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued. That the Americans should therefore send their ships upon a fair conjecture that the blockade had, after a long continuance, determined, and for the purpose of making fair inquiry whether it had so determined or not, is I think not exceptionable ;<sup>2</sup> though I certainly agree that this inquiry should be made not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities of fraud. In the present case, the blockade had been understood in America to have existed the whole winter, \*and [ \* 335 ] therefore it was not unreasonable to suppose that by that time it had ceased.

The papers all bear an avowed destination to Amsterdam — which I think a favorable circumstance, and, in some degree, destroys the suspicion of fraud ; if there had been a fraudulent intention, Amsterdam would not have stood so prominent to observation. The directions certainly contain some expressions which are rather awkward — “If you should not be so fortunate as to get into Amsterdam ;” this is rather an alarming expression, but perhaps it may be a criterion of a fair case ; a designing man would have been more cautious in the choice of his expression. The master was directed to inquire of the blockading frigates ; I have already said that he ought to have

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<sup>1</sup> [The Vrow Johanna, 2 C. Rob. 109.]

<sup>2</sup> [The Spes, 5 C. Rob. 80, acc.; The Adelaide, 3 C. Rob. 282.]

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The Vrow Margaretha. 1 C. Rob.

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been directed to inquire elsewhere — in the ports of the channel. But, on the whole, as the property is not disputed, and as the papers all speak openly, I do not think there is any thing to affect the owners with a fraudulent intention, and therefore I shall restore.<sup>1</sup>

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[ \* 336 ] \* THE VROW MARGARETHA, Crigsman, master.

June 6, 1799.

Brandies transferred *in transitu* from a Spanish merchant to a neutral, before the breaking out of hostilities, restored.

THIS was a case of a cargo of brandies, shipped by Spanish merchants in Spain, in May, 1794, before Spanish hostilities, and transferred to Mr. Berkeymyer at Hamburg, during their voyage to Holland.

For the captors, the *King's Advocate* and *Sewel*, contended, that the property of these goods was to be considered under the original shipment, as belonging either to the shippers in Spain or to the consignees in Holland; that in either case, the consequence of what had taken place between the two countries, subsequent to hostilities, they would be subject to condemnation; that it had been the invariable practice of the Prize Court to look only to the time of shipment, and that there is no instance of a claim being sustained for goods purchased of the enemy *in transitu*.

For the claimants, the *Advocate of the Admiralty* and *Lawrence*,

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<sup>1</sup> In a later case, *The Posten*, Hyll, 8th August, 1799, a Danish ship from Drontheim to Amsterdam, taken off the Texel, and proceeded against for a breach of the blockade of Amsterdam, the same excuse was made, that they expected to receive information on the spot; and *The Betsey*, Goodhue was cited. The court said, "Ships must call somewhere to obtain information, for the court will not allow the information to be obtained at the mouth of the blockaded port." The case of *America* is different; though even in their case it must be understood that the blockaded port is not the proper place for inquiry. But here in Europe, where the different states have constant intelligence, and may be said to live as it were under one roof, it shall never be permitted that a ship shall sail with a knowledge of the blockade, under pretence of further inquiry at the very spot blockaded. Condemned.

So in the practice of Holland — "Quæ enim proxima locis obsessis deprehenduntur, non alia ratione publicantur, quam quod ex facto tacite ad hostem commeandi propositum colligatur; idemque esse, si id ex instrumentis perspicue constet, non est cur dubitemus. Bunk, Q. J. Publ. li. ch. ii. p. 90.

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The Vrow Margaretha. 1 C. Rob.

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contended, that the rule relied on might be true in shipments made in an enemy's country in time of war; but that it could not apply to a case like this, in which shipment, being previous to hostilities, (and before they could be in any way foreseen,) \*fur- [ \*337 ] nished a just exception to the rule; and was also a sufficient answer to any suspicion of a fraudulent or collusive transfer.

JUDGMENT.

SIR W. SCOTT. This is a claim of Mr. Ph. Berkeymyer, of Hamburg for some parcels of wine which were seized on board three Dutch vessels detained by order of government in 1795. The ships have been since condemned; the cargoes were described in the ship's papers, as far as the property was expressed, as belonging to Spanish merchants. It is material, in this case, to consider the relative situation of the countries from which and to which these cargoes were going. Spain and Holland were then in alliance with this country and at war with France; it might, therefore, be an inducement with a Spanish merchant to conceal the property of his goods, although it does not appear to have existed in any great degree, as the goods were coming under an English convoy, and as they were shipped "as Spanish wines," and destined, avowedly, to Holland; there was, therefore, nothing in this part of the case to mislead our cruisers. Mr. Berkeymyer is allowed to be an inhabitant of Hamburg, although he had made a journey, a short time previous to the shipment of these cargoes, to Spain, (where he had resided some years before) to settle his affairs, and bring off the property which he had left behind him. He had quitted Spain, however, previous to the breaking out of Spanish hostilities, and had resumed his original character of a merchant of Hamburg. The account which he gives of his transactions in Spain, as far as they regard this case, is, \* that he [ \*338 ] entered into a contract with two Spanish houses for some wines, which were at the time actually shipped, and *in itinere* towards Holland. The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was shipped, till the delivery. If that could be maintained, there would be an end of the question, because it has been admitted that these wines were shipped as Spanish property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace — for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) — such a transfer *in transitu* might cer-

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The Vrow Margaretha. 1 C. Rob.

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tainly be made. It has even been contended, that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy.<sup>1</sup> If such a rule did not exist, all goods shipped in the enemy's country, would be protected by transfers which it would be impossible \* to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; and in that sense I recognize it as the rule of this court.<sup>2</sup> But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.<sup>3</sup>

It has been farther objected to the validity of this contract, that a part of the wines did actually reach Holland, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract. To the extent of that part it may do so, and the deficiency must be made up to the purchaser by other means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to Petersburg. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the

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<sup>1</sup> [The Ann Green, 1 Gall. 289; The Francis, 1 Gall. 449; 2 Gall. 392; S. C. 8 Cranch 354; 9 Cranch, 183; The San Jose Indiano, 1 Wheat. 208; The Josephine, 4 Rob. 25; The Jonge Pieter, 4 C. Rob. 79; The Marianna, 6 C. Rob. 24; The Atlas, 3 C. Rob. 299. But if shipped to the enemy it is otherwise. The Packet de Bilbao, 2 C. Rob. 135, n.]

<sup>2</sup> [The Dankebaar Africaan, 1 C. Rob. 107; The Sally, 3 C. Rob. (n.); The Jan Frederick, 5 C. Rob. 128; The Ann Green, 1 Gall. 289; The Frances, 1 Gall. 449; S. C. 9 Cr. 183; The Mary & Susan, 1 Wheat. 25.]

<sup>3</sup> [The Packet de Bilbao, 2 C. Rob. 133; The Vrow Anna Catharina, 4 C. Rob. 107; 5 C. Rob. 161; The Abby, 5 C. Rob. 251.]



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The Maria. 1 C. Rob.

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execution of the contract so rigorously as to extend it to those wines which never went to Holland, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

It comes, then, to a question of fact, whether it was a *bond fide* transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months later, there might have been reason to alarm the prudence of Spanish merchants, and induce them to resort to the expedient of [ \* 340 ] covering their property. But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point.

The instruments of sale have been produced, and no observation has been made upon them. The correspondence has been exhibited, and there is certainly some confusion in the dates. Explanations have been given, which are probable enough, still they are but conjectural. If the counsel for the captors require it, I will order the original documents in proof of these explanations to be produced, although I must say, at the same time, that the impression upon my mind is, that it is a fair transaction.

The originals decreed to be produced.

January 15th, 1800. The captors being satisfied with the farther proof produced, Mr. Berkeymeyer's claims were restored without opposition.

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THE MARIA, Paulsen, master.<sup>1</sup>

June 11, 1799.

A vessel sailing under convoy of an armed ship, for the purpose of resisting visitation and search, condemned.<sup>2</sup>

THIS was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron, to several ports of France,

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<sup>1</sup> [Affirmed on appeal, July 2d, 1802.]

<sup>2</sup> See *The Elzabe*, 4 C. Rob. 108; 1 Kent. Comm. 155. But otherwise it seems if the intention was only to resist search by the vessels of a nation other than the captor's.

## The Maria. 1 C. Rob.

Portugal, and the Mediterranean, and taken, January, 1798, sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers.

In December, 1797, this case coming on to be argued on [\* 341] the original evidence, the court directed \*farther information to be given by both parties, respecting the precise acts that took place at the time of capture, the instructions under which the convoyed ships were sailing, and also the instructions to the Swedish frigate.

On a subsequent day this information being produced, it was again argued at much length.

On the part of the captors, the *King's Advocate* and *Arnold*, in substance contended, if the case of this ship and cargo were to be considered singly, and separated from the principal question of convoy, there are many circumstances attending it of a very noxious aspect. It was going on an asserted destination to Genoa, at a time when that port was become almost a hostile port, by its subserviency to all the purposes of the French marine, whilst our ships and cruisers were absolutely excluded. It was going under the certificate of the French consul, in compliance with the unjust decree of the French [\* 342] government,<sup>1</sup> and the articles of which the cargo \*consisted,

The Happy Couple, 1 Stew. 65. The United States have made treaty stipulations as to searching vessels under convoy, with the following countries:

Brazil,	viii.	Statutes at Large	.....	395
Central America,	viii.	"	.....	332
Chili,	viii.	"	.....	438, 439
Colombia,	viii.	"	.....	316
Ecuador,	viii.	"	.....	544
France,	viii.	"	.....	188
Guatemala,	x.	"	.....	
Mexico,	viii.	"	.....	420
Netherlands,	viii.	"	.....	30
New Grenada,	ix.	"	.....	893
Peru,	x.	"	.....	
Peru Bolivia,	viii.	"	.....	493
Prussia,	viii.	"	.....	94, 170
Sweden,	viii.	"	.....	68
Venezuela,	viii.	"	.....	478

Neutral goods on board armed belligerents are not prize, even if resistance is made, unless the neutral owner coöperates in some manner in the resistance. The *Nereide*, 9 Cranch, 388; The *Atalanta*, 3 Wheat. 409. But see The *Fanny*, 1 Dod. 443; 1 Duer on Ins. 770, note ii.

As to the right of visitation and search, see *post* 360, note.]

<sup>1</sup> Decree, 18th January, 1797. "L'état des navires en ce qui concerne leur qualité de neutre ou d'ennemi sera déterminé par leur cargaison; en conséquence tout

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were articles of a contraband nature. It is true they are such articles as the Swedes are now permitted to carry in time of war, under certain circumstances, but only under a strict observance of good faith, a conduct perfectly neutral, and in all cases subject to a right of preëmption on the part of a belligerent nation. And farther, the truth of this asserted destination to Genoa is exposed to great suspicion from the discretionary power with which the master was intrusted, of going elsewhere.

These are circumstances unfavorable in themselves; but they assume a more distinct hostile character from the circumstance of being taken sailing under the protection of an armed force, and associated for the purpose of resisting visitation and search from the cruisers of this country. The act of resistance to the lawful rights of search, is the ground on which it is principally contended that this case is subject to confiscation. For although this fact may receive color and complexion of a more hostile nature from other circumstances, it is alone sufficient to incur the penalty of confiscation. The right of visitation and search in time of war, even in the most innoxious cases, is an established right of belligerent powers, acknowledged and referred to in the treaties of the states of Europe. It [\* 343] is admitted by all speculative writers on the law of nations.

Bynkershoek expressly admits it in these words: "*Velim animadvertas, eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse.*" Lib. i. ch. 14. And Vattel, Lib. iii. § 114, acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible this right may be wrongfully exercised by cruisers, resistance is not the legal remedy, as there is a regular and effectual remedy, provided by all the maritime codes of Europe, in the responsibility which cruisers lie under to make compensation for any injurious exercise of their right, in costs and damages. These principles being admitted, as they were indeed admitted in the former hearing, it becomes a question of fact, whether there was that hostile resistance that will subject the parties to the penalty of confiscation. On this point it is submitted that the instructions of the Swedish government to the

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bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre, ou de ses possessions, sera déclaré de bonne prise, quelque soit le propriétaire de ces denrées ou marchandises." See Atcheson's Report of a Case in King's Bench, Appendix, page 155, where the reader will see the late regulations of the French government in matters of prize.

In consequence of this decree, all neutrals were required to take a certificate from the French consuls that their goods were not of British produce or manufacture.

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[ \* 344 ] commander of this convoy<sup>1</sup> lay upon him as \* a positive injunction to prevent search by all possible means, and "that violence must be opposed by violence." These are carried into execution by the sailing orders,<sup>2</sup> which forbade their merchantmen "to submit to search; but if any boat attempted to come alongside, to sheer off from them." It is still farther carried into effect by all that passed at the time; and more especially by the act of forcibly removing an officer who had taken possession of one ship, and carrying him on board the frigate. And it is again confirmed by the regret which the commander expressed that he had not fired, protesting, "that if the ships had not been seized at night he would have resisted."

For the claimants, *Laurence* and *Swabey*. The original importance of this question, great as it undoubtedly was, has been very materially increased by the manner in which it has been brought on.

The claimants have reason to complain that every thing has been brought forward *ex parte* by the captors. The instructions of the Swedish commander are produced in an unauthenticated [ \* 345 ] form, and introduced \* only under a note from the under secretary of state. It is not proved that they were the whole of the instructions. It must, therefore, rest with the court to say how far they are sufficiently authenticated. The instructions under which the English commander acted have been altogether withheld. On the part of the claimant's evidence, the officer of the Swedish frigate has been sent away to render an account to his own government, and by that means the parties are deprived of the benefit of

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<sup>1</sup> *Instructions to the Commander* :—

"In case the Lieutenant-Colonel should meet with any ships of war of other nations, one or more of any fleet whatever, then the Lieutenant-Colonel is to treat them with all possible friendship, and not give any occasion of enmity; but if you meet with any foreign armed vessel, which on speaking should be desirous of having still farther assurance that your frigate belongs to the king of Sweden, then the Lieutenant-Colonel is, by the Swedish flag and salute, to make them know that it is so; or if they would make any search among the merchant-ships which are under your convoy, which ought to be endeavored to be prevented as much as possible, then the Lieutenant-Colonel is, in case such thing should be insisted on, and that remonstrances could not be amicably made, and that notwithstanding your amicable portment, the merchant-ships shall be nevertheless violently attacked, then violence must be opposed against violence."

<sup>2</sup> *Sailing Instructions to the Merchantmen* :—

"All merchantmen ships, during the time they are under convoy of his Majesty's ships, frigates, or sloops, are forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching, but in case such boats show an intention to come alongside, the merchant-ships are to sheer off from them."

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his evidence. Under these disadvantages, however, it is still to be contended that there has been no act of hostility committed against this country. There is no disposition to assert a right on the part of neutral merchant ships to resist visitation and search by the cruisers of a belligerent state. It is not to be argued, undoubtedly, that neutrals have a right in all cases to resist search. If such a speculative doctrine is asserted by any states, it is for them to maintain it. In the present case we stand upon no such position, but upon something which appears to have been overlooked — a treaty on this important question of search between the two countries. Treaty between England and Sweden, 1661, art. 12. After an express treaty, it is not allowable to presume any thing contrary to that compact on the part of the other state, nor to argue on general principles to defeat the force of the obligation arising from it on our part. Search is by this treaty to be exercised only on a refusal to produce the certificates or ship's papers; in no other case is it justifiable. And although a strong suspicion might still justify a seizure under the responsibility of costs and damages; still, in the manner of making this seizure, (and the whole of this case rests on the course of the proceedings,) if we did not proceed in the manner in which [ \* 346 ] we ought to have done, there is an end of our right under the compact; and we are not at liberty to impute any thing that ensued in consequence of our own irregularity, as an act of aggression against the other party. These are the principles on which it is intended to support the present claim. Originally, and in its natural appearance, this convoy is to be considered as a neutral convoy; and therefore it lies on the captor to show by some act that there was a departure from neutrality; for it cannot be pretended that a mere intention (if it were proved) would be sufficient, under any system of law, to incur the penalty of an actual offence. It seemed to be admitted by the court on a former day, that there was just distinction to be made between two cases of convoy — between a convoy of an enemy's force and a neutral convoy. The former would stamp a primary character of hostility on all ships sailing under its protection; and it would rest with the parties to take themselves out of the presumption raised against them. But that it would be, even in that case, nothing more than a presumption, is determined by a late case before the Lords, — *The Sampson Barney*, an asserted American armed ship, sailing with French cruisers at the time they engaged some English ships, and communicating with the French ships by signal for battle. In that case, although there had been a condemnation below, the Lords sent it to farther proof, to ascertain whether there had been an actual resistance.

[COURT. I do not admit the authority of that case to the extent you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible.<sup>1</sup>]

[ \* 347 ] \* In the other case of a neutral convoy, there is no presumption of a hostile character arising from it, and therefore it remains with the captors to show that there was an actual resistance in this case. Coming then to the question of fact, with the provisions of the treaty kept constantly in view, and remembering that when there is a treaty regulating the mode and manner of proceeding, both parties are bound to proceed accordingly, and that any presumptions which are raised, should proceed upon the words of that compact, and not depart from it, where will the captors find any actual resistance in the conduct of these parties ?

The instructions are relied upon, but they are general, and do not any more than the other circumstances preceding or attending this transaction, point, in any degree, to a resistance towards this country. It is notorious, that at the time of passing the French decree against English merchandise, which is deservedly reprobated on all sides, the Swedish merchants did apply for a protection of this kind ; and therefore the probability is at least as great, that it was intended to protect them against French cruisers as against this country. The directions are, "to observe an amicable deportment ; but that violence must be opposed by violence ;" expressions on which it will not be fair to put any other construction than what is compatible with the provisions of the treaty, or to suppose that they meant more than that the stipulations of the treaty were to be faithfully maintained.

What passed then at the time ? Was there any thing like [ \* 348 ] actual personal resistance ? Certainly not. \* From the evidence of M'Dougal, it appears that there was nothing like an hostile appearance shown towards the Wolverine, till after four days had passed in discussion between the commanders. The Swedish commander had a right to expect to have been first addressed ; under the treaty the certificates should have been demanded. If not produced, the ships might have been searched ; and, on strong suspicion, seizure might have been made. But the question is, have the captors proceeded in this way ? If, in opposition to this they have at once superseded all forms and said, we seize and detain, the matter assumes a different aspect, and we have no right to exact a rigid observance of form on the other side. On describing the convoy, what was done on the part of the captors ? It was on that side that the

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<sup>1</sup> [See remarks of Story, J., 9 Cranch, 441, 442, as to The Sampson Barney.]

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first appearance of menace was shown. The English ships immediately beat to quarters; the destination is inquired of, and an answer given; but there is no demand for papers; no attempt to search. Capt. Lawford states, that, as a measure of prudence, he sent immediately to the admiralty for particular instruction, and received orders to detain the convoy. On the first interview, the Swedish commander immediately communicated his instructions with the greatest readiness; from which it appears, that, in his opinion, they contained nothing hostile to this country. The removal of a petty officer, that has been relied on as act of resistance, was more a matter of form than actual opposition, used as a sort of protest against the irregular proceeding of the captors, and did not for a moment retard the actual delivery of possession on the part of the merchantmen. The subsequent acts show still \* more strongly how little the acts [ \* 349 ] of the captors were directed by the treaty; and how little they themselves thought that any penalty of prize had accrued to them by this circumstance of convoy. Instead of the usual demand for the ship's papers in the first instance, they were not demanded till August. They were afterwards returned to one vessel, and an offer was made to all those bound to neutral ports to depart; but they refusing to go without some compensation for detention, proceedings were then instituted for the first time, on the principle of convoy — a principle which cannot now come into discussion, owing to the irregular proceedings of the captors; and which, besides, cannot fairly be enforced against the merchantmen, by this court, whilst the government has permitted the frigate to depart, and has declined to consider the act of the commander as an act of hostility against the state. On these grounds, and advertng to former practice, in which some instances occur of restitution of ships taken under convoy, whilst no precedents of condemnation on this principle are adduced, it is submitted that the claimants have done nothing to forfeit their neutral character, and are therefore entitled to restitution.

#### JUDGMENT.

SIR W. SCOTT. This ship was taken in the British channel, in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

\* The facts attending the capture did not sufficiently appear to the court upon the original evidence; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attes-

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tations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to [ \* 350 ] the king's proctor \* from the office of the British secretary of state for the foreign department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the court has to determine this most important question ; for its importance is very sensibly felt by the court. I have, therefore, taken some time to weigh the matter maturely ; I should regret much, if that delay has produced any private inconvenience ; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the court,) that I have interposed more time in forming my judgment than was fairly due to the importance of the question, and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me ; — namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations ; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm ; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no [ \* 351 ] \* duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question ; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favor of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in



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which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted; and if authority is required, I have authority — and not the less weighty in this question for being Swedish authority — I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced; I mean Baron Puffendorff.<sup>1</sup> The passage to \* which I allude is to be found in a note of Barbey- [ \* 352 ] rac's, on his larger work, L. viii. c. 6, s. 8. Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV., by a lawyer, upon the continent, Groningius, who was desirous of supporting the claims of neutral commerce, in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:

“I am not surprised that the northern powers should consult the general interest of all Europe, without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. These princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power which threatens Europe with slavery, and the Protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard.” In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. His words are memorable. I do not overrate their importance, when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely without notice, as another preliminary observation, (though without meaning to lay

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<sup>1</sup> Puffendorff was not actually born in Sweden, but is usually claimed and allowed as a writer of that country, from his employment in it under the king of Sweden. The great work on which his fame is principally built, was given to the world during his residence in that country.

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any particular stress upon it,) that the transaction in question took place in the British channel, close upon the British coast, a station over which the crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors, for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered, "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he despatched immediately a messenger to the admiralty, keeping the convoy in his view; and having received orders from the admiralty by the return of his messenger to detain these merchant ships and carry them into the nearest English port,

[ \* 354 ] he sent \* Sir Charles Lindsay, and Captain Raper to communicate them in the civilest terms to the Swedish commodore, who showed his instructions to repel force by force if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British squadron to prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by The Romney, keeping close under his lee, lower deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board Captain

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Lawford, to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

\* Captain Raper states, that on going on board the Swed- [ \* 355 ] ish frigate, he found all the men at their quarters, and the ship clear for action; that the commodore showed his orders and expressed his firm determination to carry them into execution. Captain Lawford sent a boat with an officer on board several of the convoy, to desire they would follow into Margate Roads; their answer was, they would obey no one but their own commodore.

Lieutenant M'Dougal describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring-to without firing at them. On his going on board one of them, the master declared that he had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who, by his order, took possession of the helm.

Mr. Cockraft is another witness to the same effect, and Mr. Candish, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach against the proceedings of the English were addressed to him, and the commodore protested, that if he had not been surprised he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts: that a large number of vessels, connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met \* with, close upon the British coast, by [ \* 356 ] his Britannic Majesty's cruisers; that a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruisers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force which overawed it; that the act being effected in the night, by the prudence of

the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night; that a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr. Raper's log-book, which proves that the merchantmen refused to admit the British officers on board, and declared that they would obey nobody but their own commodore; a fact to which Mr. McDougal likewise bears testimony. It is contradicted still more forcibly by the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels. The latter have been brought into court by themselves, and of the authenticity of the former there is no reasonable doubt; for they are transmitted

[ \* 357 ] to me upon the faith of one of the great public offices \* of the British government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the court; because, if the act of the captors was illegal, the orders of the admiralty would not justify it, and the want of orders would not vitiate, if the act was legal. No mystery, however, was made about these, for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruisers of Tripoli, and an affidavit has been brought in to show that that government had begun hostilities against the Swedes. The language, however, of these instructions is as universal as language possibly can be; it is pointed against the "fleets of any nation whatever." It is, however, said that this was merely to avoid giving offence to the Tripoline government. But is the Tripoline government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state, merely to save appearances with a government which, they allege in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and

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for this plain reason, that it is merely a suggestion, neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it \*is clear that if it had been so, the commander of the frigate [ \* 358 ] must have had most explicit instructions to that effect.

They could never have put such general instructions on board, meaning that they should be limited in their application to one particular state, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use, whereas nothing can be more certain than that he had been left without any such restrictive instructions; he, therefore, acts as any other man would do, upon the natural sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these—they are incapable of being misunderstood: “In case the commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the commander is to treat them with all possible friendship, and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should be desirous of having further assurance that your frigate belongs to the king of Sweden, then the commander is by the Swedish flag and salute to make known that it is so; or if they would make any search amongst the merchant vessels under your convoy, which ought to be endeavored to be prevented as much as possible, then the commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made, and that notwithstanding your amicable comportment the merchant ships should nevertheless \*be violently attacked, then vio- [ \* 359 ] lence must be opposed against violence.” Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension—“If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant ships, you are to talk them out of their purpose if you can; and if you can't, you are to fight them out of it.” That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchant-men? That they were acted upon is already shown in the affidavits which I have stated; that they were deliberately accepted, appears from their own instructions, which exactly tally with them. These instructions declare in express

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terms, "that all merchant-ships, during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats show an intention of coming alongside, the merchant-ships are to sheer from them." It appears from the attestation that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act — an act common to all the parties concerned in it; and of which every part belongs to all; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

[ \* 360 ] \* This being the actual state of the fact, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation.<sup>1</sup> I say, be the ships, the

<sup>1</sup> [The Anna Maria, 2 Wheat. 327; The Eleanor, 2 Wheat. 345, acc. The right does not exist in time of peace. The Marianna Flora, 11 Wheat. 1; Le Louis, 2 Dod. 210; The Mentor, 1 Edw. 209; The Antelope, 9 Wheat. 66. The United States have made treaties on the subject of visitation and search of vessels with the following countries:

Brazil,	viii.	Statutes at Large	395
Central America,	viii.	" "	332
Chili,	viii.	" "	438
Colombia,	viii.	" "	314
Ecuador,	viii.	" "	544
France,	viii.	" "	188
Great Britain,	viii.	" "	122
Guatemala,	x.	" "	
Mexico,	viii.	" "	420
Morocco,	viii.	" "	101
Netherlands,	viii.	" "	38, 48
New Grenada,	ix.	" "	891, 892
Peru,	x.	" "	
Peru Bolivia,	viii.	" "	492
Prussia,	viii.	" "	92, 170
Spain,	viii.	" "	144, 148
Sweden,	viii.	" "	66, 68, 74
Venezuela,	viii.	" "	476, 478

For note of treaties respecting visitation of vessels under convoy, see The Maria, 1 C. Rob. 340.

cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as preëxisting, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant \* in subjects of this kind has ever, that I know of, breathed [ \* 361 ] a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force — something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly. That the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. I say legally, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this court, I have no right to entertain. All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the king of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think

[ \* 362 ] \* that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, (as in some late instances they have agreed,<sup>1</sup>) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant. The law and practice of nations (I include partially the practice of Sweden when it happens to be [ \* 363 ] \* belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps remember to forget them, when they happen to be themselves belligerent,) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war — that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner; and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the ex-

<sup>1</sup> It is made an article of treaty between America and Holland, an. 1782; Art. 10, Mart. Tr. vol. ii. p. 255. [See note, ante, 1 C. Rob. p. 340; The Nossa Senhora Da Ajuda, 5 C. Rob. 52.]



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pense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.<sup>1</sup> For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In Book III. c. vii. § 114, he expresses himself thus: "On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on rencontre en \*mer. On est donc en droit de les visiter. Quelques [ \*364 ] nations puissantes ont refusé en différents temps de se soumettre à cette visite, aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise." Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in Europe, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated French ordinance of 1681, now in force, Article 12, "That every vessel shall be good prize in case of resistance and combat." And Valin, in his smaller Commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the resistance alone is sufficient.<sup>2</sup> He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, "in case of resistance or combat." And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice \*on the inquiries I have been able to make in the Institutes [ \*365 ] of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty,<sup>3</sup> is in the Order

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<sup>1</sup> [The Topaz, 2 Acton, 20; The Dispatch, 3 C. Rob. 278, and note. To work confiscation in such case the neutral must have reasonable cause to believe that war exists. The St. Juan Baptista, 5 C. Rob. 33.]

<sup>2</sup> In some of the treaties of France this article is expressly inserted in the disjunctive. Treaty between France and the dutchy of Mecklenburg, Art. 18, an. 1779. Mart. Tr. vol. ii. p. 40, also between France and Hamburg, an. 1769.

<sup>3</sup> "B. 7. Item se aucune nef ou vessel de la ditte flotte a congie et pouvoir de l'admiral de passer hors de la flotte entour aucun message ou autre besongne, s'ils encontre ou trouvent aucuns vesseaux estranges sur la mer ou en ports des ennemys, adon-

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[ \* 366 ] of Council, 1664, \*Article 12,<sup>1</sup> which directs, "That when any ship, met withal by the royal navy or other ship com-  
[ \* 367 ] \*missionated, shall fight or make resistance, the said ship

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ques ceulx de nostre flotte doivent demander des maistres et gouverneurs de telz vesseaulx estrangers dont ilz sont et eulx bien examiner de leur charge ensemblement avecques leurs muniments et endentures, et s'il est trouve aucune chose de suspicion en telz vesseaulx que les biens sont aux ennemys, qui sont trouvez dedens les dits vesseaulx avec leurs maistres et gouverneurs ensemblement avecques les biens dedens icelle estants sauvement seront amenees devant l'admiral, et illecques s'il est trouve qu'ilz sont loyaulx marchants et amys sans suspicion de colerer, les biens seront a eulx redelivrees sans eulx rien dommager, autrement seront pris avec leurs biens et raenonnez comme la loy de mer veult et demande.

"B. 8. Se aucunes de noz nefz ou vesseaulx rencontrent sur la mer ou en ports aucuns autres vesseaulx, qui facent rebelletees ou defense encontre ceulx de noz nefz ou vesseaulx, adonques bien lise a noz gents, les autres comme ennemys assaillir et par forte mayn les prendre et amener entierement, comme ilz les ont gaignez, devant l'admiral sans eulx piller ou endommager, illecques de prendre ce que loy et coustume de mer veult et demande, &c."

<sup>1</sup> During the struggle for naval superiority, which took place between the maritime states of Europe, about the middle of the seventeenth century, the pretension of resisting search by the protection of convoy, was put forward with much caution, and apparently for the first time, by Christina, queen of Sweden, August 16th, 1653. Art. 4th. "They shall in all possible ways decline that they, or any of those that belong to them be searched. For seeing they are only sent to prevent all inconvenience and clandestine dealings, it is expected that they may be believed, and suffered to pass and proceed on their course unmolested, with all such things as are under their care." It was restrained to neutral ports. Art. 6th. "And more especially, for certain reasons, it is our command, that our men of war do chiefly, and in the beginning, steer their course to such ports as are neutral in the English and Dutch war, till we give any farther directions on that account. However, without any hindrance to our own subjects, that intend to carry on their own free trade to England and Holland without convoy." Thurloe's St. Papers, vol. i. p. 424.

In 1655, it was taken up by Holland. "They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and their ships." Ibid. vol. iv. p. 203.

In May, 1656, there happened an actual rencounter on this subject between a fleet of merchantmen from Cadiz, (Spain being then at war with England,) under the convoy of De Ruyter, with seven men of war, and the commodore of some English frigates. "Antwerp. We have certain news of the arrival of De Ruyter in Zealand from Cadiz, from whence he brought stores of plate, mostly belonging to merchants of this city; he was met withal at sea by some English frigates, but finding themselves too weak they let him go." Ib. vol. iv. p. 740. See also the particular account of what passed, given by a Dutch officer to the States General. "That upon De Ruyter declaring that there was not any thing on board belonging to the king of Spain, they parted." Ib. vol. iv. p. 730. It appears, however, that the arrival occasioned great triumph in Holland and Flanders, and that the fleet was deeply laden with silver for the king of Spain, and the service of his armies in Flanders. "De Ruyter brought in his own ship, and others in his fleet, the sum of 20,000,000 (perhaps rials) of gold and silver, the greatest part for the king of Spain's use and the merchants of Brabant

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and goods shall be adjudged lawful prize." A \* similar article occurs in the proclamation of 1672. I am aware, that in

and Flanders." Ibid. vol. iv. p. 748, 732. The 12th article of the Eng. Ord. of 1664 might perhaps be pointed against these pretensions.

In another letter in the same collection, 21st September, 1657, from Nieuport, the Dutch ambassador in England, we find the subject of convoy was strongly pressed at that time, and resisted on the part of this country, "respecting secret articles," concerning the visitation of ships which are convoyed under the flag of the state. I acquainted their Lordships, that of old all kings and states had made a difference between particular ships sailing upon their risks and adventures, and between ships of the state and those which pass the sea under their flag and protection. That their High and Mighty Lords were of an opinion that it does strengthen the security of this state, that the ships of the state and officers should be responsible, as it were, for the ships sailing under their convoy; and that which I had proposed in my last memorandum concerning the same on behalf of their High and Mighty Lords was no new thing, but that plan had been most commonly proposed on all the treaties since the year 1651, in that manner that without regulating the same according to the said articles, the troubles at sea, whereof I had so often complained, could not be removed and prevented, and I alleged several examples. Upon which now one, then the other, of the said three Lords<sup>1</sup> replied, and did very much insist, that it could not consist with their security; that they could not nor ought to trust so much to particular captains at sea; that it would be an introduction and encouragement to disaffected persons to assist the enemy, and urged especially that in no former treaties any such articles were found, and that their High and Mighty Lords had no reason to desire now any such novelty. I said that the practice on this side in regard of searching and visiting ships without difference was a new thing, and that the inhabitants of the United Netherlands, feeling the trouble and inconvenience of it, had reason to insist that it may be rectified by a good regulation." Vol. vi. p. 511. See also for the former conference, vol. v. p. 663.

It appears that so many objections had arisen on the treaty proposed on the part of Holland, that it was found necessary to form an entirely new project. Vol. vi. p. 523, 538.

In a subsequent letter from the Hague, 30th November, 1657, it appears that the treaty broke off on this difference. "*Le Sieur Nieuport n'est pas encore ici arrivé, mais il écrit aussi d'avoir pris son congé. Il est fort croyable qu'il ne sera guère content d'avoir failli à achever le traité de la marine; néanmoins, je m'imagine que la Hollande à présent ne seroit pas fort marry de ne l'avoir pas achevé, pour ne se pas oster la liberté de visiter des mêmes en cette guerre contre Portugal.*" Thurloe's St. Pap. vol. vi. p. 622.

On the subject of search generally, without any expressed reference to convoy, there is this letter from Cromwell to General Montagu. "The secretary hath communicated to us your letter of the 28th, by which you acquaint him with the directions you have given for the searching of a flushing and other Dutch ships, which (as you are informed.) have bullion and other goods aboard them belonging to the Spaniard, the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the laws of nations and the particular treaties which are between this commonwealth and the United Provinces, and, therefore, we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein. Hampton Court, 30th August, 1657."

<sup>1</sup> Thurloe, Wolsely, Jones.

those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon.<sup>1</sup>

[ \* 369 ] But the article I refer to is not of those he \*reprehends, and it is observable that Sir Robert Wiseman, then the King's Advocate General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am, therefore, warranted in saying, that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorised to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the distinct authority of Vattel,—upon the Institutes of other great maritime countries, as well as those of our own country,—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

[ \* 370 ] The first ground of exemption stated on the part \* of the claimants is the treaty with Sweden, 1661, article 12, and it was insisted by Dr. Lawrence, that although the belligerent country is authorized by the treaty to exercise rights of enquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "there is any other just and strong cause of suspicion," then the ship

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<sup>1</sup> Lord Clarendon's Life, p. 242.

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is to undergo search.<sup>1</sup> The treaty, therefore, recognizes the rights of inquiry and search, and the violation of those [\* 371] rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate. I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant-ships is not a *casus fœderis* that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance, and the answer returned was, that, "they were Swedish ships bound to various ports in the Mediterranean, laden with iron, hemp, pitch and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each [\* 371a] particular ship, without doubt, had its own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to [\* 372] any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations;<sup>2</sup> though formerly, when the hostilities of

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<sup>1</sup> It is said by Secretary Thurloe, in his conference with the Dutch ambassador, December, 1656, "that the point of passes was very considerable to the state, and that the same was never agreed to in any treaty with any nation, but lately to Sweden." Th. St. P. vol. 5, p. 663.

A reference to the certificate of foreign magistrates, with a primary but inconclusive credit ascribed to them, appears to have been established in Denmark, by Frederick II., in 1583, as a custom house regulation respecting the customs and sund duties payable by foreign merchants, — speaking of abuses, "we, not minding any longer to suffer the same, do therefore will that henceforth every man which uses his trade of merchandise and navigation through our custom towns and streams do cause a certain and just brief of all the laden merchandises and goods to be comprehended in the certificates which he is to take under the seal of his magistrate, and deliver the same to our customers, with this warning, that if any man arrive there without such true and just certificate, and any hindrance and inconvenience do happen unto him in that respect, the ship being searched, that then he impute the same unto himself, and not unto us or ours; and if upon cause of suspicion the ships should be searched, notwithstanding that a particular certificate had been delivered; and that in them more merchants' goods should be found than were comprehended in the certificates which were brought in, then not only those goods, but the whole ship and goods, as being forfeited, shall be confiscated and seized upon." Promulged, 1583. Rym. Fœd. vol. xvi. p. 457, 352.

<sup>2</sup> [See The Sarah Christina, 1 C. Rob. 237, 241; The Richmond, 5 C. Rob. 325; The Christina Maria, 4 C. Rob. 166; The Jonge Tobias, 1 C. Rob. 329; The Twee Juffrowen, 4 C. Rob. 242; The Neptunus, 6 C. Rob. 408; The Charlotte, 1 Acton, 20

Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making that treaty which is the basis of it,<sup>1</sup> I mean the treaty in which Whitlock was employed in the year 1656; for I conceive that Valin expresses the truth of this matter, when he says, p. 68, "*De droit ces choses*," (speaking of naval stores,) "*sont de contrabande aujourd'hui et depuis le commencement de ce siecle, ce qui n'étoit pas autrefois neanmoins*;" and Vattel, the best recent writer upon these matters, explicitly admits, amongst positive contraband, "*les bois et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre*." Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble lord,<sup>2</sup> then secretary of state, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that, although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty and of the latter treaty derived [ \* 373 ] \* from it, yet that the exposition which the later judgment and practice of Europe has given upon this subject, would, in some degree, affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750, the lords of appeal in this country declared pitch and tar, the produce of Sweden, and on board a Swedish ship bound to a French port, to be contraband, and subject to confiscation, in the memorable case of the *Med Good's Hjelpe*.<sup>3</sup> In the more modern understanding of this matter, goods of this nature being the produce of Sweden, and the actual property of Swedes, and conveyed by their own navigation, have been deemed, in British Courts of Admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-emption and pre-emption;<sup>4</sup> or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual jus-

<sup>1</sup> [For note of the treaties of the United States respecting contraband, see *The Twende Brodre*, 4 C. Rob. 33.]

<sup>2</sup> The late Earl of Mansfield.

<sup>3</sup> *Lords*, 1750.

<sup>4</sup> [*The Haabet*, 2 C. Rob. 174.]

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tice. Thirdly ; another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea, upon such a number of vessels, even those which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty refers to, excited by the circumstances of such number of vessels with such \*cargoes in- [ \*374 ] tended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry ? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced ? Certainly not by the treaty itself ; for the remedy for infraction is provided in compensations to be levied, and punishments to be inflicted upon delinquents by their own respective sovereigns. Article 12. How stands it by the general law ? I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission ; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause, a merchant vessel has not a right to say for itself, (and an armed vessel has not a right to say for it,) " I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force ? Surely nothing but battle and bloodshed, as often as there is any thing like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained ? How far the peace of the world will be benefited by taking the matter from off its present footing and \* putting it upon this, is for the advocates [ \*375 ] of such as measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences of this kind, where they have happened through accident or error ; and to redress by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimants was, that the intention was never carried into act. And I agree with Dr. Laurence, that if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would

not constitute a violation of right. But how stands the fact in the present case? The intention gives way, so far as it does give way, only to a superior force. It is for those who give such instructions to recollect, that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions, and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their [\*376] utmost extent \*only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences. If he meets with a superior force, he abandons his hostile purpose. If he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colors. Nothing can be more clear, upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, *fugit indignata*.

3. It is said that the papers were not immediately taken possession of nor proceedings instituted till long after the arrival in port. These are unquestionably irregularities; but I agree with the king's advocate in maintaining, that they are not such irregularities as will destroy the captor's right of proceeding, for the claimant had his remedy in the way of a monition. How these delays were occasioned, whether in consequence of pending negotiations, (as has been repeatedly asserted in the course of the argument,) I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against [\*377] the merchant-vessels, and not against the \*frigate, the principal wrongdoer. On what grounds this was done — whether on that sort of comity and respect which is not unusually shown to immediate property of great and august sovereigns, or how otherwise — I am, again, not judicially informed; but it can be no legal bar



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to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a redelivery of her papers, the act of the captors may perhaps furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting, (for any thing that I know) that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honor and good faith of the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a court of the law of nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right

of maritime capture in war; and to do this, how? by the [ \* 378 ] direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other — it has been for some few years past preparing in Europe — it is extremely fit that it should be brought to the test of a judicial decision; for a worse state of things cannot exist, than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it; and, in my apprehension, not more inconsistent with it than with the amity of neighboring states, and the personal safety of their respective subjects.

The only remaining question which I have to consider is, the matter of expenses; and this I think myself bound to dispose of with as much tenderness as I can use in favor of individuals. It is to be observed, that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such persons. The authority of their country has been in some degree surprised in this matter. The captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the claimants are clearly entitled to have their expenses charged upon the value of the property up to the time of the order for further proof.

From that time, the property might have been withdrawn upon bail, and it is no answer to the court to say that this gentleman or another gentleman did not think it advisable to commit their private [ \* 379 ] fortunes in the extent of the security required. It is \* the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expenses for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order of further proof; and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself; I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

## APPENDIX.

- **STANDING INTERROGATORIES**, *to be administered on behalf* [\* 381]  
*of Our Sovereign Lord George the Third, by the grace of God,*  
*of Great Britain, France, and Ireland, King, Defender of the Faith. To*  
*all commanders, masters, officers, mariners, and other persons found on board*  
*any ships and vessels, which have been, or shall be seized or taken as prize,*  
*by any of his Majesty's ships or vessels of war, or by mer-*  
*(L. s.) chants' ships or vessels, which have or shall have commissions*  
**GEORGE R.** *or letters of marque and reprisals, concerning such captured*  
*ships, vessels, or any goods, wares, and merchandise on*  
*board the same, examined as witnesses in preparatory, during the present*  
*hostilities.*

LET each witness be interrogated to every of the following questions, and their answers to each interrogatory written down.

**I. INTERROGATE.** Where were you born, and where have you lived for these seven years last past? Where do you now live, and how long have you lived in that place? To what prince or state, or to whom are you, or have you ever been a subject, and of what cities or towns have you been admitted a burgher or freeman, and at what time and in what manner were you admitted a burgher or freeman, and at what time and in what manner were you so admitted? How long have you resided there since you were admitted a burgher or freeman, or where have you resided since? What did you pay for your admission? Are you a married man, and if married, where do your wife and family reside?

**II. INTERROGATE.** Were you present at the time of taking and seizing the ship or her lading, or any of the goods or merchandises concerning which you are now examined? Had the \*ship, concerning which [\* 382] you are now examined, any commission? What, and from whom?

**III. INTERROGATE.** In what place, latitude, or port, and in what year, month, and day, was the ship and goods, concerning which you are now examined, taken and seized? Upon what pretence and for what reasons were they seized? Into what place or port were they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made at the time when the said ship was taken; and if yea, how many guns were fired, and by whom; and by what

ship or ships were you taken ? Was such vessel a ship of war, or a vessel acting without any commission, as you believe ? Were any other, and what, ships in sight at the time of the capture ?

IV. INTERROGATE. What is the name of the master or commander of the ship or vessel taken ? How long have you known the said master, and who appointed him to the command of the said ship ? Where did such master take possession of her, and at what time ; and what was the name of the person who delivered the possession to the said master ? Where doth he live ? Where is the said master's fixed place of abode ? If he has no fixed place of abode, then let him be asked, Where was his last place of abode, and where does he generally reside ? How long has he lived there ? Where was he born, and of whom is he now a subject ? Is he married, if yea, where does his wife and family reside ?

V. INTERROGATE. Of what tonnage or burthen is the ship which has been taken ? What was the number of mariners, and of what country were the said seamen or mariners ? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where ?

VI. INTERROGATE. Had you or any of the officers or mariners belonging to the ship or vessel concerning which you are now examined, any and what part, share or interest in the said ship, or her lading ? If yea, set forth who and what goods or interest you or they have ? Did you belong to the said ship or vessel at the time she was seized and taken ? In what capacity did you belong to her ? How long have you known her ? When and where did you first see her, and where was she built ?

[ \* 383 ] \* VII. INTERROGATE. What is the name of the ship ? How long hath she been so called ? Do you know of any other name or names by which she hath been called ? If yea, what were they ? Had she any passport or sea-brief on board, and from whom ? To what ports and places did she sail during her said voyage before she was taken ? Where did her last voyage begin, and where was the said voyage to have ended ? Set forth the quality of every cargo the ship has carried to the time of her capture, and what ports such cargoes have been delivered at ? From what parts and at what time, particularly from the last clearing port, did the said ship sail, previously to the capture.

VIII. INTERROGATE. What lading did the said ship carry at the time of her first setting sail in her last voyage, and what particular sort of lading and goods had she on board at the time when she was taken ? In what year and in what month was the same put on board ? Set forth the different species of the lading and the quantities of each sort.

IX. INTERROGATE. Who were the owners of the ship or vessel, concerning which you are now examined, at the time when she was seized ? How do you know that they were the owners of the said ship at that time ? Of what

nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject?

X. INTERROGATE. Was any bill of sale made, and by whom, to the aforesaid owners of the said ship; and if any such was made, in what month and year? Where, and in the presence of what witnesses, was such bill of sale made? Was any and what engagement entered into concerning the purchase further than what appears upon the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what is become of it?

XI. INTERROGATE. Was the said lading put on board in one port and at one time, or at several ports and at several times, and at what ports, by name? Set forth what quantities of each sort of goods were shipped at each port?

XII. INTERROGATE. What are the names of the respective laders or owners, or consignees, of the said goods? What \* countrymen [\* 384] are they? Where do they now live and carry on their business or trade? How long have they resided there? Where did they reside before, to the best of your knowledge? And where were the said goods to be delivered, and for whose real account, risk, or benefit? Have any of the said consignees or laders any, and what, interest in the said goods? If yea, whereon do you found your belief that they have such interest? Can you take upon yourself to swear that you believe, that at the time of the lading the cargo, and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do, and will belong to the same persons, and to none others?

XIII. INTERROGATE. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

XIV. INTERROGATE. Are there, in Great Britain, any bills of lading, invoices, letters, or instruments, relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof, and when they were brought or sent to this kingdom?

XV. INTERROGATE. Was there any charter-party signed for the voyage in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom, was such charter-party made? What were the contents of it?

XVI. INTERROGATE.

of lading, letters or other writings,

were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize ? Were any of them burnt, torn, thrown overboard, destroyed, or cancelled, concealed or attempted to be concealed, and when, and by whom, and who was then present ?

**XVII. INTERROGATE.** Has the ship, concerning which you are now examined, been at any time, and when, seized as prize, and condemned [**\* 385**] as such ? If yea, set forth into what port she was \* carried and by whom ; and by what authority, or on what account she was condemned ?

**XVIII. INTERROGATE.** Have you sustained any loss by the seizing and taking of the ship, concerning which you are now examined ? If yea, in what manner do you compute such, your loss ? Have you already received any indemnity, satisfaction, or promise of satisfaction, for any part of the damage which you have sustained, or may sustain by this capture and detention, and when, and from whom ?

**XIX. INTERROGATE.** Is the said ship or goods, or any, and what part, insured ? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made ?

**XX. INTERROGATE.** In case you had arrived at your destined port, would your cargo, or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom ? Or was the lader to take the chance of the market for the sale of his goods ?

**XXI.** Let each witness be interrogated of the growth, produce, and manufacture, of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof ?

**XXII. INTERROGATE.** Whether all the said cargo, or any and what part thereof, was taken from the shore or quay, or removed or transshipped from one boat, barque, vessel, or ship, to another ? From what, and to what shore, quay, boat, barque, vessel, or ship, and when and where was the same so done ?

**XXIII. INTERROGATE.** Are there in any country, besides Great Britain, and where, or on board any and what ship or ships, vessel or vessels, other than the ship and vessel, concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers, or documents, relative to the said ship or vessel and cargo, and of what nature are such bills of lading, invoices, letters, instruments, papers, or documents, and what are the contents ?

**XXIV. INTERROGATE.** Were any papers delivered out of the said [**\* 386**] ship or vessel, and carried away in any manner whatsoever ? And when, and by whom, and to whom, and in whose custody, possession, or power, do you believe the same now are ?

**XXV. INTERROGATE.** Was bulk broken during the voyage in which you were taken, or since the capture of the said ship? And when, and where, by whom, and by whose orders? And for what purpose, and in what manner?

**XXVI. INTERROGATE.** Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers by name? Of what nation, rank, profession, or occupation? Had they any commission? For what purpose, and from whom? From what place were they taken on board, and when? To what place were they finally destined, and upon what business? Had any, and which, of the passengers, any and what property or concern, or authority, directly or indirectly, regarding the ship and cargo? Were there any officers, soldiers, or mariners, secreted on board, and for what reason were they secreted? Were any of his Britannic Majesty's subjects on board, or secreted or confined at the time of the capture? How long, and why?

**XXVII. INTERROGATE.** Were, and are, all the passports, sea-briefs, charter-parties, bills of sale, invoices and papers, which were found on board entirely true and fair? Or are any of them false or colorable? Do you know of any matter or circumstance to affect their credit? By whom were the passports or sea-briefs obtained, and from whom? Were they obtained for this ship only? And upon the oath, or affirmation of the persons therein described, or where they were delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long a time were they to last? Was any duty or fee payable and paid for the same? And is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? And has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea-briefs were granted? And if not, where was the ship at the time? Had any person on board any let-pass or letters of safe conduct? If yea, from whom, and for what business?

**XXVIII. INTERROGATE.** If it should appear that there are in [\* 387] Ireland, or the British American colonies, or in any other place or country, besides Great Britain, any bills of lading, invoices, instruments, or papers relative to the ship and goods, concerning which the witness is now examined; then interrogate, how were they brought into such place or country? In whose possession are they, and do they differ from any of the papers on board, or in Great Britain or Ireland, or elsewhere, and in what particular do they differ? Have you written or signed any letters or papers, concerning the ship and her cargo? If yea, what was their purport? To whom were they written and sent, and what is become of them?

**XXIX. INTERROGATE.** Towards what port or place was the ship steering her course at the time of her being first pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or

port for which she appears to have been destined by the ship papers? Was the ship before, or at the time of her capture, sailing beyond, or wide of the said place or port to which she was so destined by the said ship papers? At what distance was she therefrom? Was her course altered at any, and what time, and to what other port or place, and for what reason?

**XXX. INTERROGATE.** By whom, and to whom hath the said ship been sold or transferred, and how often? At what time and at what place, and for what sum or consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? Or what security or securities, have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe in your conscience, such sale or transfer has been truly made? And not for the purpose of covering or concealing the real property? Do you verily believe that if the ship should be restored she will belong to the persons now asserted to be the owners, and to none others?

**XXXI. INTERROGATE.** What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other guns, mortars, howitzers, balls, shells, hand-grenades, muskets, carbines, fusees, halberts, spontoons, swords, [\* 388] bayonets, locks for muskets, \* flints, ram-rods, belts, cartridges, cartridge-boxes, pouches, gunpowder, saltpetre, nitre, camp equipage, military tools, uniforms, soldiers' clothing or accoutrements, or any sort of warlike or naval stores? Were any of such warlike or naval stores, or things, thrown overboard, to prevent suspicion at the time of the capture? And were, and are any such warlike stores, before described, concealed on board under the name merchandise, or any other colorable appellation, in the ship papers? If yea, what are the marks on the casks, bails and packages, in which they were concealed? Are any of the before-named articles, and which, for sole use of any fortress or garrison in the port or place to which such ship was destined? Do you know, or have you heard of any ordinance, placard, or law existing, in such kingdom or state, forbidding the exportation of the same by private persons without license? Were such warlike or naval stores put on board by any public authority? When and where were they put on board?

**XXXII. INTERROGATE.** What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined, at the time of the capture?

#### ADDITIONAL INTERROGATORIES.

**I. INTERROGATE.** Did the said ship, on the voyage in which she was captured, or on, or during any, and what former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels? If



yea, interrogate for what reason or purpose did she sail under such convoy ? Of what force was or were such conveying ship or ships ? And to what state or country did such ship or ships belong ? What instructions or directions had you or did you receive on each and every of such voyages when under convoy, respecting your sailing or keeping in company with such armed or conveying ship or ships ; and from whom did you receive such instructions or directions ? Had you any and what instructions or directions, and from whom, for resisting or endeavoring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your ship's documents and papers ? Or any and what other papers, that might be, or were \* put on board your [\* 389 ] said ship ? If yea, interrogate particularly as to the tenor of such instructions, and all particulars relating thereto ? Let the witness be asked if he is in possession of such instructions, or copies thereof, and, if yea, let him be directed to leave the same with the examiner, to be annexed to his deposition.

II. INTERROGATE. Did the said ship, during the voyage in which she was captured, or on doing any, and what, former voyage or voyages, sail to or attempt to enter any port under blockade by the arms or forces of any, and which, of the belligerent powers ? If yea, when did you first learn or hear of such port being so blockaded, and were you at any, and what time, and by whom warned not to proceed to, or to attempt to enter such blockaded port ? What conversation or other communication passed thereon ? And what course did you pursue upon, and after, being so warned off ?

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*The following Copies of a LETTER and INSTRUCTIONS from the Right Hon. Sir WILLIAM SCOTT and Sir JOHN NICHOLL, prepared at the instance of His Excellency JOHN JAY, Esquire, though not in the London Edition of this Work, cannot otherwise than prove an acceptable addition to this volume.*

TO HIS EXCELLENCY JOHN JAY, ESQUIRE.

SIR,—I have the honor of sending the paper drawn up by Dr. Nicholl and myself ; it is longer and more particular than perhaps you meant ; but it appeared to be an error on the better side, rather to be too minute, than to be too reserved in the information we had to give ; and it will be in your Excellency's power either to apply the whole or such parts as may appear more immediately pertinent to the objects of your inquiry.

I take the liberty of adding, that I shall at all times think myself much honored by any communications from you, either during your stay here, or after your return, on any subject in which you may suppose that my situation can give me the power of being at all useful to the joint interests of both countries. If they should ever turn upon points in which the duties of my official station

appear to me to impose upon me an obligation of reserve, I shall have no hesitation in saying, that I feel them to be such. On any other points, on which you may wish to have an opinion of mine, you may depend on receiving one, that is formed with as much care as I can use, and delivered with all possible frankness and sincerity.

I have the honor to be,

With great respect, &c.

WILLIAM SCOTT.

Commons, Sept. 10th, 1794.

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PAPER ENCLOSED IN THE FOREGOING LETTER.

SIR,— We have the honor of transmitting, agreeably to your Excellency's request, a statement of the general principles of proceeding in prize causes, in British Courts of Admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions.

The general principles of proceeding cannot, in our judgment, be stated more correctly or succinctly, than we find them laid down in the following extract from a report made to his late Majesty in the year 1753, by Sir George Lee, then judge of the Prerogative Court, Dr. Paul, his Majesty's advocate-general, Sir Dudley Rider, his Majesty's attorney-general, and Mr. Murray, (afterwards Lord Mansfield) his Majesty's solicitor-general.

"When two powers are at war, they have a right to make prizes of the ships, goods and effects of each other, upon the high seas. Whatever is the property of the enemy, may be acquired by capture at sea; but the property of a friend cannot be taken provided he observes his neutrality.

"Hence the law of nations has established,

"That the goods of an enemy, on board the ship of a friend may be taken.

"That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

"That contraband goods, going to the enemy, though the property of a friend, may be taken as prize; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.

"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

"Before the ship, or goods, can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard; and condemnation thereupon as prize, in a Court of Admiralty, judging by the law of nation and treaties.

"The proper and regular court, for these condemnations, is the court of that state to whom the captor belongs.

"The evidence to acquit or condemn, with or without, costs or damages, must, in the first instance, come merely from the ship taken, viz., the papers on board, and the examination on oath of the master, and other principal officers; for

which purpose there are officers of admiralty in all the considerable seaports of every maritime power at war, to examine the captains, and other principal officers of every ship, brought in as a prize, upon general and impartial interrogatories.<sup>1</sup> If there do not appear from thence ground to condemn, as enemy's property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into farther proof thereof.

"A claim of ship, or goods, must be supported by the oath of somebody, at least as to belief.

"The law of nations requires good faith. Therefore every ship must be provided with complete and genuine papers; and the master at least should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colorable papers; if any papers be thrown overboard; if the master and officers examined in *preparatorio*, grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say, whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages. For which purpose all privateers are obliged to give security for their good behavior; and this is referred to, and expressly stipulated by many treaties.

"Though from the ship's papers, and the preparatory examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect. If he will not show the property, by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the Court of Admiralty is thought to be erroneous, there is, in every maritime country, a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, viz., the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

"This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties.

"In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the law of nations, and

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<sup>1</sup> [See *ante*, pp. 381 - 389, for the Interrogatories.]

particular treaties, all captures at sea have immemorially been judged of in every country in Europe. Any other method of trial would be manifestly unjust, absurd and impracticable."

Such are the principles which govern the proceedings of the Prize Courts.

The following are the measures which ought to be taken by the captor, and by the neutral claimant upon a ship and cargo being brought in as prize.

The captor, immediately upon bringing his prize into port, sends up or delivers upon oath to the registry of the Court of Admiralty all papers found on board the captured ship. In the course of a few days, the examinations in preparatory of the captain and some of the crew of the captured ship, are taken upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the admiralty as soon as taken. A monition is extracted by the captor from the registry, and served upon the royal exchange, notifying the capture, and calling upon all persons interested to appear and show cause, why the ship and goods should not be condemned. At the expiration of twenty days, the monition is returned into the registry with a certificate of its service, and if any claim has been given, the cause is then ready for hearing, upon the evidence arising out of the ship's papers, and preparatory examinations.

The measures taken on the part of the neutral master or proprietor of the cargo, are as follows :

Upon being brought into port, the master usually makes a protest, which he forwards to London, as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship, and such parts of the cargo as belong to his owners, or with which he was particularly entrusted. Or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps.

The master, correspondent, or consul applies to a proctor, who prepares a claim supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed, belong, and that no enemy has any right or interest in them. Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein.

If the captor has neglected in the mean time, to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions and by the prize act to proceed immediately to adjudication) a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It however seldom happens (owing to the great pressure of business, especially at the commencement of a war) that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition. In that case, each cause must necessarily take its turn; correspondent measures must be taken by the neutral master if carried within the jurisdiction of a vice-admiralty court, by giving a claim supported by his

affidavit, and offering security for costs, if the claim should be pronounced grossly fraudulent.

If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence) and he afterwards applies at the registry of the lords of appeal in prize causes (which is held at the same place as the registry of the High Court of Admiralty) for an instrument called an inhibition, and which should be taken out within three months if the sentence be in the High Court of Admiralty, and within nine months, if in a Vice-Admiralty Court, but may be taken out at later periods, if a reasonable cause can be assigned for the delay that has intervened. This instrument directs the judge, whose sentence is appealed from, to proceed no further in the cause; it directs the registrar to transmit a copy of all the proceedings of the inferior court; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant, to the amount of two hundred pounds to answer costs, in case it should appear to the court of appeals, that the appeal is merely vexatious. The inhibition is to be served upon the judge, the registrar, and the adverse party and his proctor, by showing the instrument under seal, and delivering a note or copy of the contents. If the party cannot be found, and the proctor will not accept the service, the instrument is to be served, "*viis et modis*," that is by affixing it to the door of the last place of residence, or by hanging it upon the pillars of the royal exchange. That part of the process above described, which is to be executed abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is indorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad.

If the cause be adjudged in a vice-admiralty court, it is usual upon entering an appeal there, to procure a copy of the proceedings which the appellant sends over to his correspondent in England, who carries it to a proctor, and the same steps are taken to procure and serve the inhibition, as where the cause has been adjudged in the High Court of Admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained, by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

Upon an appeal, fresh evidence may be introduced, if, upon hearing the cause the lords of appeal shall be of opinion, that the case is of such doubt, as that farther proof ought to have been ordered by the court below.

Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction, and with the real property of the goods claimed. In corroboration of these, affidavits may be annexed, original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by the affidavits of persons who can speak to their authenticity. And if copies or extracts, they should be collated and certified by

public notaries. The affidavits are sworn before the magistrates or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British consul.

The degree of proof to be required depends upon the degree of suspicion and doubt, that belongs to the case. In cases of heavy suspicion and great importance, the court may order what is called "plea and proof," that is, instead of admitting affidavits and documents introduced by the claimants only, each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or to condemn the capture, and to examine witnesses in support of the allegations, to whom the adverse party may administer interrogatories. The depositions of the witnesses are taken in writing; if the witnesses are to be examined abroad, a commission issues for that purpose. But in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to.

Standing commissions may be sent to America for the general purpose of receiving examinations of witnesses in all cases where the court may find it necessary for the purposes of justice, to decree an inquiry to be conducted in that manner.

With respect to captures and condemnations at Martinico, which are the subjects of another inquiry contained in your note, we can only answer in general, that we are not informed of the particulars of such captures and condemnations, but as we know of no legal court of admiralty established at Martinico, we are clearly of opinion that the legality of any prizes taken there, must be tried in the High Court of Admiralty of England, upon claims given, in the manner above described, by such persons as may think themselves aggrieved by the said captures.

We have the honor to be, &c.

(Signed)

WILLIAM SCOTT,  
JOHN NICHOLL.

Commons, Sept. 10th, 1794.

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REPORTS  
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CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF ADMIRALTY.

COMMENCING WITH  
THE JUDGMENTS  
OF THE  
RIGHT HON. SIR WILLIAM SCOTT.  
MICHAELMAS TERM, 1798.

BY CHR. ROBINSON, LL.D.,  
ADVOCATE.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

VOLUME II.

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REPORTS OF CASES  
DETERMINED IN THE  
HIGH COURT OF ADMIRALTY.

---

THE EENROM, Fronier, master.<sup>1</sup>

May 21, 1799.

Trade of neutrals with the colony of the enemy.

Effect of covering enemy's property, by neutral merchants, with regard to other goods belonging to them, in the same case.<sup>2</sup>

THIS was a case of a ship and cargo taken on a voyage from Batavia to Copenhagen, December 27, 1798, by his majesty's ship, The Brilliant.

JUDGMENT.

SIR WILLIAM SCOTT. In this case the ship is claimed as the entire property of Messrs. Fabritius and Wever, of Copenhagen, and half the cargo also is claimed as belonging to them, by Mr. Fabritius, the son, being employed as supercargo on board this vessel.

The court directed that this gentleman should give some account of the property of the remainder of the cargo. [\* 2 ] It being claimed "as the undivided property of Fabritius and others," he was called upon to specify who were the copartners. The court was more particularly induced to make this order, by the special application which had been made on the part of the claimant to allow this very gentleman to be examined, as a person who was acquainted with every particle of the transaction, and who could give the court the most satisfactory information upon every circumstance

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<sup>1</sup> [Affirmed on appeal, March 27, 1802.]

<sup>2</sup> [The Susa, 2 C. Rob. 251; The Graaf Bernstorff, 3 C. Rob. 109; The St. Nicholas, 1 Wheat. 417; The Betsy, 2 Gall. 377; The Fortuna, 3 Wheat. 236; The Dos Hermanos, 3 Wheat. 76; The Calypso, 2 C. Rob. 154; The Herkimer, 1 Sten. R. 17.]

belonging to it. To the surprise of the court, this gentleman has now said in his affidavit, "that he cannot set forth the specific interests, except as hereafter mentioned, as he was sick and confined at Batavia, and obliged to entrust the actual shipment of the cargo to Mr. Inglehart, with whom he had not come to any final settlement before he left that place." It is worthy of notice that, although Mr. Inglehart was the actual shipper, his name does not appear in any one of the ship's papers, although it has happened to peep out since, in several other cases. It is, I think, on the face of this excuse, an extraordinary circumstance, that a person employed as supercargo in a foreign country, (who must necessarily be required to give an account of all his transactions to his principals,) falling, from illness, under the necessity of executing his trust by an agent, should not, immediately on his recovery, put himself in possession of every thing that had been done for him by his substituted agent during his confinement; this is surely no more than what every agent, in such a situation, would naturally have done. Mr. Fabritius says, "he did not;" — "but knowing that the funds arising from the out-

[ \* 3 ] ward cargo of this vessel, \* and from the profits of her voyage to China, as far as they were applied to the present cargo, were not equal to more than a moiety; and also learning in England that Messrs. Fabritius and Wever had caused insurance to be made here to the amount of about half of this cargo, he is led to believe that not more than a moiety belongs to these gentlemen." The court cannot forget that, in a very late case, *The Denmark*, this very outward cargo of *The Eenrom* was represented as overflowing the capacity of her return, and as being employed in purchasing a large ship over and above that returned cargo. It now, however, appears that it was not equal to a moiety of the returned cargo. The other moiety, Mr. Fabritius says, "he supposes to have belonged to Mr. Inglehart, or to some person for whom he acted." He says, indeed, that Mr. Inglehart told him it belonged to him; but whether in his own right or as agent he cannot say; "but from hearing, on his return to England, that Marshall Blucker had caused an insurance to be made here on a part distinct from Messrs. Fabritius and Wever, he is induced to think that some part belongs to him."

This leads me to dispose of this part of the case, the interest of Mr. Blucker. First, Mr. Cowie states, in his affidavit, "that he received orders (he does not say from whom) in May, 1798, to insure for Marshall Blucker, in *The Eenrom*, one thousand two hundred pounds on ship and cargo, and that he believes him to be interested to that amount." It appeared to the court to be an extraordinary circumstance that the insurance should be made in these terms, on ship

and cargo, for a person who was not suggested to have any interest in the ship; and the explanation was, that [\*4] Marshall Blucker, not being a mercantile man, might have fallen into this error inadvertently. I should rather have thought that such an expression, deviating from common speech, was more like the phrase of a person speaking in technical language, than of a person ignorant of trade, and writing simply from his own apprehension of his own concerns; and more especially since I learn, on reference to the merchants, that it is mercantile language, and that such an insurance, though including ship and cargo, is allowed to apply solely to an interest of that amount in the cargo, if the party had an interest in the cargo to that amount, and no interest in the ship. Mr. Cowie states farther, "that he has written for instructions," but does not say when. This ship was brought in in January, 1799. As a careful and diligent agent, he must have taken the first opportunity of giving intelligence of the capture; but it is not said what answer was received, nor is it even said that Mr. Cowie expects directions to claim. No paper on board expresses the name of Mr. Blucker, and he is perfectly quiescent, and, as far as appears, ignorant of the matter; therefore, on the whole, I think this is not such a claim as I can admit under the circumstances in which it is introduced. If Marshall Blucker has any real interest in this cargo, he may still claim it elsewhere, in the Court of Appeal.

There is another claim that I will also dispose of before I come to the consideration of the ship and cargo. It is a claim of Mr. Fabritius, the supercargo, for some bills of exchange asserted to have been given for money borrowed for the repairs of the ship, and purchased afterwards on his own account, from the [\*5] person in whose favor he had originally drawn them; these are pressed as regular bottomry bonds. It is not a little extraordinary that Mr. Fabritius, having such full power over the whole concern as supercargo, should resort to this mode of raising money; but it is only necessary to look at the papers produced, to see whether they are of that species of instruments which, in maritime law, will constitute a lien on the ship. If I should think that they are not of that description, it will not be necessary to enter into the question whether a claim can be given on account of a mere lien on a captured ship; though I am of the opinion, for the moment, that it is not such an interest as is regarded and protected by the prize law. Now, looking at these bills, I am rather inclined to think that they are not of that kind which the maritime law supports as hypothecation bonds; there is no binding of the vessel, no hypothecation whatever; they are mere bills of exchange, stating something about

repairs, indeed, but in no sense bearing the binding force of bottomry bonds. In the most liberal way in which they can be considered, and with the least scrupulous adherence to form that is consistent with substantial reasoning, I cannot hold them to be maritime bottomry bonds, and I reject the claim founded on them.

I come now to the consideration of the ship and cargo; or rather, I shall invert the order, and consider the cargo first. The outward cargo of this voyage consisted of tar, sheathing copper, sail cloth, and other articles, which, by treaty, this country and Denmark are [ \* 6 ] expressly forbidden to carry to the enemy of the \* other. It sets out, therefore, with a violation of public treaties, and of the private law of Denmark; because every treaty is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws. The clearance was general to the East Indies, though in some papers a destination to Fredericksnagore is held out. With respect to these general clearances to the East or West Indies, I cannot say that they are absolutely and necessarily illegal, although they are certainly inconvenient to all parties, by throwing a great uncertainty on the nature of the intended voyage. If neutral governments permit these indefinite clearances, which seem to allow a destination to the ports of a belligerent, (if such belligerent has any ports in the East or West Indies,) it seems proper, at least, that the nature of the cargo should correspond, and care should be taken that the cargo should be such as their subjects are allowed to carry to an enemy's port; there should be an affidavit, as in voyages to an enemy's port, that the cargo contains no prohibited goods; for without some precaution of this kind great frauds may be committed against the public treaties of the country, and the country may be involved in the consequences of such frauds. There seems to have been no such security taken in this case, and therefore I am inclined to think that there must have been some understanding on this subject at Copenhagen, that the voyage was to be to their own ports, or to neutral ports only; for it is not to be imagined that such a general clearance could have been obtained for articles of this description, being understood to have a liberty of going to an enemy's port. Such [ \* 7 ] a thing cannot be \* supposed, without imputing to the Danish government such a connivance at the irregular and illegal conduct of its subjects, as I am in no degree disposed to surmise. The fact, however, is asserted to be, that this vessel left Copenhagen with these noxious articles on board, and with full liberty of going to any port. That there was any other destination than to Batavia is not suggested by any one circumstance in the cause;

therefore we may describe it to have been a voyage not contingent, nor left optional, but clear and certain, and definite, in direct violation of public treaties, and of the law of Denmark, founded on those treaties.

These are circumstances *in limine*, and this is the manner in which the voyage sets out. The next circumstance on which I shall observe is, that the management of this whole affair seems to have been committed to Mr. Fabritius, jun., and that he acted with unlimited control, although he is scarcely mentioned in the papers; only in a corner of the instructions given to the master, who was to conduct every thing. Mr. Ponsaing, who was master of the outward voyage, is directed to go to Fredericksnagore and manage every thing; but in a note "Ponsaing and the supercargo are directed to dispose of the cargo and to invest another in the best manner they might be able;" this is the only manner in which Mr. Fabritius is mentioned, in a character merely *assistendo*, although he now appears to have been intrusted with unlimited power over the whole business.

The instructions farther direct, "that if the cargo should not be sufficient for the returned voyage, other \*goods might [ \* 8 ] be taken on freight, with a condition that they should be consigned to Messieurs Fabritius and Wever." This is not like an authority to buy a cargo in undivided moieties for these gentlemen, and other persons; there are no directions for a partnership. When I see how these instructions are executed and by whom, in a manner totally different from what they purport, I am strongly induced to suspect that they are merely colorable instructions, and that the real history of this transaction is connected with previous arrangements in Batavia between Messieurs Fabritius and Wever, and Mr. Inglehart, the person actually employed in putting this cargo on board.

The cargo is put on board by him, and it is a very material question, on which the fate of the cargo, and of the ship likewise may depend, whether it was the intention of the supercargo, in this part of the transaction, to mislead the British courts of justice, and British cruisers, as to the property of the cargo? for I am of opinion, that, if such an intention can be proved in the agent, let the interests of his employers in Denmark be what they may, they must be affected by his conduct, and the consequence will attach on them to confiscate their property so engaged. This is no ordinary supercargo. He is the son of his employer, and appears to have been delegated with greater powers than supercargoes usually enjoy; his conduct must in point of law and conscience, and under the most lenient considerations of equity, be held to bind his principal with peculiar

force. In strict law every supercargo will bind his employer; and although where law is administered with great indulgence, [ \* 9 ] cases may arise in which the court will not implicate \* the owner, as in some cases where supercargoes have appeared, taking in small parcels of goods in contradiction to the orders of their employers, the court has thought it hard to involve the interests of the owners, though perhaps strictly responsible; yet this is not a case entitled to any such favorable treatment; this is not the case of a small portion of a cargo taken in from false compassion to others, or from corrupt views of private interest; the fraud, if any, in this instance, must be that of a deliberate interfering in the war, to mask and withdraw from the rights of a belligerent, the property of his enemy, to the amount of one half of a most valuable cargo. It is not the case of an ordinary supercargo; the person delegated is intrusted with the fullest powers, and if he has abused his powers so largely conferred, it is to him that the owners must look for redress.

The regular penalty of such a proceeding must be confiscation; for it is a rule of this court, which I shall ever hold, till I am better instructed by the superior court, that if a neutral will weave a web of fraud of this sort, this court will not take the trouble of picking out the threads for him, in order to distinguish the sound from the unsound; if he is detected in fraud he will be involved *in toto*. A neutral surely cannot be permitted to say, "I have endeavored to protect the whole, but this part is really my property, take the rest and let me go with my own." If he will engage in fraudulent concerns with other persons, they must all stand or fall together. Let us see, then, if there is not reason, not only to suspect, but to conclude, that

there was a design to represent the cargo, which appears to [ \* 10 ] have belonged in great part to \* Inglehart the Dutchman, as the entire property of Fabritius and Wever. In the first place Mr. Inglehart was the shipper, yet his name is not once mentioned in the papers; in no one place does his name occur, which cannot be an accidental omission, since it is according to the most ordinary course of business that the name of the shipper should be specified. I must, therefore, consider this suppression, as a studied contrivance, to withdraw from the notice of the court, every connection that Mr. Inglehart has had with this transaction. The master and the mate describe Fabritius and Wever as the entire proprietors, and Mr. Fabritius, jr., as the shipper; they were examined as soon as the ship was brought in, and, as we may presume, before they were apprised of the existence of other papers. They agree with the formal papers in keeping out of sight the name of Inglehart, and never once make mention of him. This is an extraordinary circumstance, for



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The Benrom. 2 C. Rob.

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the master is in this case not a common carrier-master. He is a confidential manager of the business, according to the instructions; yet so much is he kept in the dark, or keeps himself so, that he represents Fabritius and Wever as the entire proprietors of the cargo. It is said, as an excuse for this man, that he was affected with an almost total derangement of mind whilst he was at Batavia, owing to the climate, and that he came home perfectly ignorant of the transaction; but there is no mention of this malady in his deposition, nor are there any signs of it; he gives a cool and rational recital of facts, and shows at least a method in his madness, in every part of his conduct that presents itself to our view. He was appointed joint agent with Fabritius, \*yet he was left under the delusion [ \*11 ] that the whole cargo, of which only half is now claimed, belonged to Messrs. Fabritius and Wever. If he was deceived, it serves to establish the imposition on the part of others. If he joined in the deceit, it still further fortifies the suspicion of a general combination of fraud. Mr. Fronier, who was the master substituted in his place for the returned voyage, lies under the same mistake; he describes the cargo as the entire property of Fabritius and Wever. I do not say that this court will lay down a rule so harsh as to require that every carrier-master should know the property of every part of her cargo; yet in time of war it cannot be unknown to neutrals that the master is expected to speak to the property of his cargo; more especially in a case like this, where the property is so great as one half, and where the master is a confidential person, and where there is a son of his employer in the character of a supercargo on board. Total ignorance can scarcely happen to such a master; and where it is pretended, it strongly rivets on the mind of the court a suspicion (by which I always mean a legal suspicion) that there is something behind, which it is for the interest of the parties to conceal. But the matter does not end here; there is no mention of any distinction of property in the papers. The invoice describes the whole cargo as the property of Fabricius and Weaver; and this paper is signed, not by the master but by the supercargo. It is said that the invoice is not a paper of consequence, that the bill of lading is the document to which reference is usually made; but this is both. It is a bill of lading as well as an invoice. Then how came \*this on board? It is said that Mr. Fabritius was ill, [ \*12 ] that the lading was conducted for him, and that he signed the paper without attention to its contents. How can I accede to such an explanation? Is it credible that a man, intrusted with the management of so large a concern, should fall into such a misapprehension as to sign a solemn paper asserting the whole property

belong to his employer, when he well knew that it did not? or can it be believed that on his recovery he should not have made himself acquainted with every thing that had been done for him? To act otherwise would be so monstrous, that no pretence of illness is sufficient to apologize for it.

But it is said Mr. Fabritius has, since his arrival in England, disclosed the truth and given in his claim for only one half, and much credit is assumed for this instance of fair and ingenuous conduct. Allowing all the merit that is due to such a recantation, I do not know that it can be of any avail to protect this case from the penalties attaching on the former part of the transaction; for if the court is satisfied that the intention was to hold out to British cruisers a *noli me tangere* as to the whole on an appearance of its being Danish property, although a *locus penitentiae* is to be allowed to all men, I cannot but think that it comes a little too late, under the circumstances of the present case. Shall a deceit be allowed during the whole of such a voyage; and after it has had a great part of its effect in deceiving our cruisers, shall it be done away by this late confession? If the representation of the papers, and the master, and the substituted master, had been believed, the whole of this cargo

[ \* 13 ] \* would have been long ago safe in Copenhagen or America. But what is more material, it is to be remembered that, before the present claim was given, a disclosure of evidence had been obtained from the papers of some other cases. In *The Nancy*, which was a ship under the management of the same parties, it had come to light that Mr. Inglehart was concerned in the cargo of *The Eenrom*, and in the exact proportion which squares with Mr. Fabritius's amended claim. This circumstance very much detracts from the merit of the confession, there being every reason to presume that no such claim would have been given if the evidence already exhibited in that case had not shown that a claim for the whole would be completely falsified; if so, the purpose of fraud is abandoned, merely because it can no longer be maintained.

Is the court then to believe that Mr. Fabritius came into this country with an intention of making this disclosure, and of making the claim as it now stands? or that he meant to hold out the property to be as the formal papers represent? When I look to the other steps leading to this fraud, when I find all the papers on board in this tenor, and see the master and the displaced master using the same language in their depositions, even after their arrival in this country, it would be a strain of charity, much beyond what is consistent with justice, if I did not say that it was an intention, carried into effect, to cover the whole cargo, as the property of Fabritius and

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Wever, by persons knowing the contrary, and whose acts will legally affect their employers. What in my judgment decisively proves that such was the determined purpose \*of the parties [ \*14 ] is, the fact that appears, that this ship was first carried into Lisbon, and that an inquiry was there instituted respecting the property of this ship and cargo. It has been pressed upon the court, by the captors, to receive the depositions there made by Mr. Fabritius and others; but the court has declined to receive those depositions, as irregularly taken, and, therefore, cannot advert to them. How Mr. Fabritius swore upon that occasion, with respect to this cargo, I cannot say; but I cannot think it otherwise than highly probable, that he represented the property as entirely belonging to the house of Fabritius and Wever; because I think it impossible that after such an inquiry had been pursued at Lisbon, the master and the displaced master should have continued in the error (if it is a mere error) that has led them to depose here to the same effect; unless he had so held it out, as well in those depositions, as in the conversations which he must since have had with them, prior to their examinations here. And when I recollect his extreme eagerness to be examined here upon his arrival, I cannot but think that he was at that time fully prepared to support upon oath the same representation; and that nothing but the subsequent information he received, that the secrets had already been betrayed by the papers of The Nancy, prevented him from so doing.

With respect to the ship, Is the property in that so proved as to support a claim for restitution without farther proof? If that could be maintained, I might perhaps allow it to be distinguished from the other part of the case. But if farther proof is necessary, it comes to this question, Are persons so convicted \*of an [ \*15 ] attempt to impose on the court entitled to the privilege of giving farther proof? The ship was built at Batavia, and has been constantly trading from Batavia. It must have been the property of Dutchmen; and, therefore, under any circumstances a bill of sale would be necessary; and under the particular circumstances which I have pointed out, a bill of sale could hardly be deemed sufficient. But a thicker cloud is raised over this part of the case, from what appears from a paper in The Nancy, which is signed by Inglehart, and states: "I shall accompany this with the accounts of The Eenrom, of which Messrs. Fabritius and Wever are sharers." It is said that this applies to the cargo only. It may be so; it is a possible explanation; but how can this be proved? it can be only by farther proof. Again, there are many passages in which Mr. Inglehart seems to assume great authority over the conduct of the vessel. It is said that this

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The Vryheid. 2 C. Rob.

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was in consequence of a charter-party, by which he had chartered the vessel. It may be so; but this is matter of explanation only, and of farther proof; as it is left at present, on the face of it, very ambiguous. There being the necessity of farther proof, have the parties placed themselves in a situation in which they are entitled to a privilege of this kind? It is a rule that I shall uniformly adhere to, till I am better instructed, that where a party has been convicted of an attempt to impose on the court in the same transaction, the privilege of farther proof shall be denied him, as a privilege which is justly forfeited by deception and fraud;<sup>1</sup> I shall, therefore, pronounce both the ship and cargo subject to condemnation.

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[ \* 16 ]      \* THE VRYHEID, Admiral De Winter.

June 19, 1799.

Claim of joint capture; constructive assistance not to be extended; claim rejected.<sup>2</sup>

THIS was a case of an allegation of joint capture on behalf of the Vestal frigate, in the capture of the Dutch fleet under the command of Admiral de Winter, October 11, 1798. The substance of the allegation is recited in the judgment; *vide infra*.

Against the allegation, the *King's Advocate* and *Laurence*. The legal principles on which this question must be decided, lie, it is apprehended in a very narrow compass, although it is a question of very considerable importance; and one in which the navy are waiting, with great anxiety, for the decision of this court. The allegation asserts only the merit of being associated in one common service, without setting forth any averment of being in sight at the time of capture. Formerly, it is well known, joint-capture was confined to cases of actual coöperation; and when, in consequence of frequent litigations, it was extended to cases of constructive assistance, for the purpose of preserving harmony and a good understanding in the navy, the being in sight became the principal criterion; and even

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<sup>1</sup> [The Welvaart, 1 C. Rob. 122; The Vrouw, 1 C. Rob. 163.]

<sup>2</sup> [For other cases respecting joint-captures by vessels see note to The Nordstern, 1 Acton, 128. As to joint captures by vessels and land forces, see The Vordrecht, 2 C. Rob. 55.]

that circumstance was in all cases not allowed to be sufficient, if there was any thing to rebut the general presumption of intimidation and encouragement proceeding from it. It is on this presumption of intimidation conveyed to the enemy, and of encouragement given to the actual captor, that the principle of constructive assistance is founded; and unless it is extended much \*beyond [ \* 17 ] what has ever been done in former instances, the present case cannot, by any interpretation, be brought within the benefit of that principle. Even in cases of joint-cruising, it has been decided, that that circumstance without the being in sight will not entitle parties to share as joint-captors. But the present case is infinitely weaker; it is a case of a ship detached merely to convey intelligence, separating long before the engagement, or the earliest preparations for it, and not returning till the engagement was entirely over. Suppose the case of an officer landed with despatches, and that a prize is made by the vessel in the meantime, he would not share undoubtedly; it is submitted, this case is nearly similar to that. The absence of the parties from the scene of action must alike preclude them from sharing in the capture. No precedent can be adduced from the practice of this court to support such a claim; and the court will not, for many reasons, be disposed to extend the construction, but will, it is hoped, reject this allegation in the first instance, rather than suffer it to go to proof, at a great expense and waste of time, on facts, that if proved ever so clearly, cannot entitle the parties to any benefit from them.

In support of the allegation, the *Advocate of the Admiralty*, and *Arnold*. This is a question of very great importance to the navy, as a general question; and, therefore, if the court entertains but a slight doubt about the admissibility of this allegation, it will, in conformity to the general practice of the Admiralty, and the Ecclesiastical Courts, admit it to proof, reserving the question of law to be considered, together with the facts of the case, at the final hearing. \*Whatever may have been the history of this [ \* 18 ] branch of the law, it is now the established law of this court, that a party may become a joint-captor by mere constructive assistance. It is, no doubt, desirable to preserve the rule of construction in the greatest simplicity; but the application which is now contended for, will not in any degree break into that simplicity; being in sight, is the most obvious species of constructive assistance, but it is not necessarily the only one; and, although it is founded on a presumption of encouragement and intimidation, those are circumstances which it is not necessary to prove. It is not attempted to introduce

a new principle, nor to assert this position, that in the case of an associated fleet, services performed by any detached part, will entitle all to share; but that a ship detached on a particular service connected with the main enterprise, and materially contributing to its success, may be admitted to share in the interests of prize resulting from it. No uncertainty will be introduced by such a rule, the principle of decision would remain as simple as before; the court would only have to consider whether the object of capture was, in fact, the object in view, and the cause of the detached service. To be detached for the purpose of watching the motions of the enemy, or of procuring assistance, are essential services intimately connected with the main enterprise, and such as may justly entitle the parties to a prize interest; and in the case of the *San Joseph*,<sup>1</sup> in which a whole fleet not in sight shared in the capture made by a detached vessel, it is apprehended the decision passed on the ground, that there was that joint enterprise, which might be held sufficient to

[ \* 19 ] carry with it a participation of interest. If it were \*otherwise, to detach a vessel from the squadron would be to inflict hardship and punishment on meritorious persons, by making them incapable of sharing in the success of the main enterprise, however much the object of their being detached might have contributed to it. It has been said, that an officer separated from a vessel, and landed with despatches, would not share; but that arises out of the direct words of the act of parliament and proclamation, which give the prize to persons on board, looking generally to personal services; but there is no case in which such a particular absence as this, has been held to forfeit the interest of joint capture; it would be going too far to maintain it. Suppose a party sent on shore to silence a fort, or on any other service immediately connected with the capture, it would not be said that they would not share. Then what were the services in this case? The *Vestal* was regularly associated with Admiral Duncan's fleet, and had acted under Captain Trollop's orders in reconnoitring the Dutch fleet from their first appearance; she was then sent to call in aid the whole body of the fleet under the command of Admiral Duncan, and give information to the Admiralty. This important service performed, she again returned, and joined the fleet, and was actually assisting in securing the prisoners, and bringing the captured vessels home. This is a service of a very active nature, and comes within the principle rather of coöperation than of assistance merely constructive. It may not be improper to advert to the understanding and practice of the navy

<sup>1</sup> Lords, May 4, 1784.

The Vryheid. 2 C. Rob.

in this matter; amongst them this is almost the first instance in which such a claim has been resisted. In Lord Howe's memorable victory over the French fleet \*on the 1st of [ \*20 ] June, 1794, The Audacious was allowed to share, though she had parted from the fleet on the 28th of May. There is also an instance in the case of The Canada, which had chased, and been out of sight of the fleet to which she belonged for three days, yet the whole fleet shared in her prize; and in another instance, in the Mediterranean, in the case of The Lowestoff, making a capture from the fleet, the whole fleet shared. On these grounds, considering that there is no direct case against us, and that the service rendered in the present instance is fairly within the line of analogy by which this court is used to put a construction of coöperation and joint service, on acts essentially connected with the main enterprise, it is submitted that this ship is entitled to be admitted as a joint-captor.

In reply, the *King's Advocate* contended, that the cases alluded to by no means broke in upon his argument; that in the case of The San Joseph there was a great deal of contradictory evidence, and that it was by no means established that the whole fleet was not in sight. That The Audacious was one of Lord Howe's fleet, and had engaged in the contest of the 28th of May, and had actually separated with a French vessel, The Revolutionaire, by that means contributing to reduce the enemy's force, and make the success of the ensuing contest of the 1st of June more certain; that The Canada had been detached from the fleet to which she belonged on that particular chase; and that in the case of The Lowestoff, the whole fleet were in sight; that these cases referred, therefore, to the class of cases in sight at the time of the engagement, or the commencement of the chase, of which there could be no doubt; but that the facts of the present case were not \*of a nature to support any [ \*21 ] such pretensions. It was also said that The Vestal had herself taken a prize off the Texel in which Lord Duncan shared as admiral of the station, but that his fleet did not; affording, therefore an unanswerable reason, on all terms of reciprocity, why she should not share in the prize made by the fleet during her absence.

#### JUDGMENT.

SIR W. SCOTT. This is a contest between two bodies of persons, all deserving most highly of the public, and, therefore, as far as individual merit can go, all equally entitled to every attention; it is a case of joint capture, and the court has to lament that cases of this nature are in general attended with much difficulty, as they depend

frequently on very minute facts, on which the court has to decide between contradictory representations; and it is to be regretted that the decisions of the court on this subject have not always been so uniform as it is highly desirable they should be. It would be a very great satisfaction to me, if, with the assistance which I may hope to receive from the gentlemen of the bar, it should fall within my power to establish a settled and intelligible system, on principles, that may become in future easily applicable to the various cases that may arise.

The act of parliament and the proclamation give the benefit of prize "to the takers," by which term are naturally to be understood those who actually take possession, or those affording an actual contribution of endeavor to that event. Either of these persons are naturally included under the denomination of takers; but [ \* 22 ] the courts of law have gone further, and have extended the term "taker," to another description of persons; to those, who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy.

Capture has, therefore, been divided into capture *de facto*, and capture by construction. I need not say, that the construction must be such as the courts of law have already recognized, and not a new unauthorized construction; for as the word has already travelled a considerable way beyond the literal meaning of the act of parliament, the disposition of the court will lean, not to extend it still farther, but to narrow it, and bring it nearer to the terms of the act, than has been done in some former cases. The case of *The Mars*<sup>1</sup> is a strong authority on this point; in which the claim of joint capture was disallowed to ships not in company, but stationed at different outlets to catch the enemy, who were known to be under the necessity of passing through one of them. And it was in that case intimated to be the opinion of the judges of the common law, (as I have had means of knowing,) that the court ought to come nearer home, and conform more strictly to the precise words of the act of parliament.

In all cases, the *onus probandi* lies on those setting up the [ \* 23 ] construction, because they are not persons strictly within

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<sup>1</sup> Lords, 1760. This was a case of a French ship, taken by one of three king's ships; which, being apprized of the design of the enemy to escape from Port au Prince, had taken their station at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two to share as joint-captors, though not present at the capture; but it was rejected.



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The Vryheid. 3 C. Rob.

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the words of the act, but let in only by the interpretation of those acting under a competent authority to interpret it. It lies with the claimants in joint-capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or to show some principle in their favor, so clearly recognized and established, as to have become almost a first principle in cases of this nature. The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint-captors, that where that fact is alleged, we do not call for particular cases to authorize the claim; but where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles, which are fairly to be extracted from those cases.

The facts of this case come before the court at present on the admission of the allegation; a very convenient mode surely of taking the opinion of the court in the first instance; for, if the facts stated, would not in the judgment of the court be sufficient to sustain the claim, admitting them to be proved; it would only be attended with unnecessary expense and delay to the parties, to permit them to enter into proof; it would be more convenient to resort, in the first instance, to higher authority. The allegation is, therefore, very properly examinable on its first admission. It is also very desirable that all the facts should be stated at once; and that the allegation should not be sent to be amended, (as it was necessary to do in this instance, to show the court in what manner Mr. Trollop composed a part of Admiral \*Duncan's fleet); for a repetition of argument on these facts, begets expense, and other consequences very incommodious to the parties, and to the court. All the particulars are, however, now before the court, and if I should be of opinion that they are not sufficient to sustain the claim, I cannot see what service I should do the parties by admitting them to proof; and, therefore, I should hold it better in all respects to send them to take the opinion of a superior court in the first instance. The allegation states, "that The Vestal received orders from the Admiralty to join Admiral Duncan; that she accordingly did join him, and formed one of the fleet under his command, and received directions from him to cruise off the Texel, to reconnoitre and obtain intelligence of the Dutch fleet, which she did. That Admiral Duncan cruised till the latter end of September, and then returned to Yarmouth, ordering Captain Trollop to sail with two or three vessels to watch the motions of the enemy; and leaving directions for The Vestal to put herself under the command of Captain Trollop. That The Vestal accordingly did join Captain Trollop, and made one of the ships

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The Vryheid. 2 C. Rob.

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under his command, being part of Admiral Duncan's fleet; and on falling in with the Dutch fleet, on the 8th of October, was sent by Captain Trollop to reconnoitre them. That on the next day, Captain Trollop gave The Vestal a written order to sail immediately for the first port in England, using her utmost endeavors, to fall in with Admiral Duncan on the way, to send an express to the Admiralty, and then to use his best endeavors immediately to fall in with Admiral

Duncan, wherever he was, and acquaint him with the situation of the Dutch fleet. That in pursuance \*of these orders [ \* 25 ] she sailed to England, landed the dispatches, and again returned; and actually joined Admiral Duncan, on the 13th of October. That after The Vestal was so detached, Captain Trollop, with his Majesty's ships cruising with him, joined Admiral Duncan, and never lost sight of the Dutch fleet, from the time The Vestal was so detached, to the time of the capture of the ship proceeded against. That at the time of capture, The Vestal belonged to, and composed a part of, Admiral Duncan's fleet, and was aiding and assisting in the capture; and, afterwards, with his Majesty's ships The Endymion and Ethalion, assisted in bringing into the Humber two of the Dutch fleet captured in that engagement."

Now on these facts, and having stated the *onus probandi* to lie on the persons setting up the construction, I am to inquire on what authority this claim is to be sustained; there are no cases cited as being directly in point; but the case of The Signior San Joseph<sup>1</sup> has been alluded to; that is a case which I perfectly recollect, having been concerned in arguing it, but it was in its principal circumstances entirely different from the present case. That was a case of two vessels detached from the fleet under the command of Admiral Pigot, in the West Indies, to chase two strange ships appearing in sight, the fleet bearing up all the time as fast as possible to support them; the chasing vessels took the two ships first appearing, and also a third, on which the dispute arose. There was much contrariety of evidence, whether the fleet (which was continuing to sail in the same direction,) was not up, and in sight; and the chief doubt arose owing to the night coming on, for if it had been day, the fleet

[ \* 26 ] \* would clearly have been in sight; and it was, at all events, well known to be at hand and ready to have given any support that might be wanting. Under these circumstances the Court of Appeal affirmed the sentence of the court below, pronouncing for joint-capture. And in that sentence, it is I believe true, as it

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<sup>1</sup> Lords, May 4, 1784.

has been stated by the counsel, that some mention was made of the words "joint enterprise;" but taking the case altogether, it can by no means be said to go the length of the present claim.

As far as cases go then, there is an entire failure of authority on the part of *The Vestal*; but the usage of the navy has been resorted to, and a case has been cited of *The Audacious*, one of the fleet under the command of Lord Howe, being permitted to share in the victory of the 1st of June, 1794. It is admitted, and it is certainly true, that the practice of the navy, in opposition to the words of the act of parliament, or a proclamation, or to the established practice of law, cannot weigh or be of any authority. At the same time the court would be extremely unwilling to break in on any settled and received notions of the navy, or to disturb a practice generally prevailing among themselves. But I agree with the King's Advocate, that the case cited is different from the present; in that case *The Audacious* had actually engaged the enemy's fleet, and had separated only in chase of one of their ships. *The Canada*, another case which has been mentioned, chased from the fleet by signal on the prize coming in sight; and *The Lowestoff*, which is another case, stated to have happened in the Mediterranean, was not detached from the Mediterranean fleet till after the chase had actually begun.

These circumstances, therefore, 'materially distinguish these [ \* 27 ] cases from the present; and I am at liberty to say, that no case in point, no authority, has been produced. Is there then any admitted principle? The gentlemen have resorted to the general principle of common enterprise; and it has been contended, that where ships are associated in a common enterprise, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made. But certainly this cannot be maintained to the full extent of these terms; many cases might be stated in which ships so associated would not share. Suppose a case, that ships going out on the same enterprise, and using all their endeavors to effectuate their purpose, should be separated by storm, or otherwise; no one would contend that they should share in each other's captures. There is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing; it cannot be laid down to that extent, and indeed it would be extremely incommodious that it should. Nothing is more difficult than to say precisely where a common enterprise begins. In a more enlarged sense, the whole navy of England may be said to be contributing in the joint enterprise of annoying the enemy. In particular expeditions every service has its divisions and subdivisions; operations are to be begun and conducted at different places. In the attack of an island there may be

different ports and different fortresses, and different ships of the enemy lying before them ; it may be necessary to make the attack on the opposite side of the island ; or to associate other neighboring islands as objects of the same attack. The difficulty is, to say where the [ \* 28 ] joint enterprise actually begins. Again, \* is it every remote contribution, given with intention or without intention, that can be sufficient ? I apprehend that is not to be maintained. An actual service may be done without intention ; or there may be a general intention to assist, and yet no actual assistance given. Can any body say that a mere intention to assist, without actual assistance, though acted upon with the most prompt activity, would in all cases be sufficient ? If persons under such claims could share, there would be no end to dispute ; no captor would know what he was about, whether in every prize he made there might not be some one fifty leagues distant, working very hard to come up, and even acting under the authority of the Admiralty to coöperate with him. In serving his country every captor would be left in uncertainty, whether some person whom he never saw, and whom the enemy never saw, might not be entitled to share with him in the rewards of his labor. The great intent of prize is to stimulate the present contest, and to encourage men to encounter present fatigue and present danger, an effect which would be infinitely weakened, if it were known that there might be those not present, and not concerned in the danger, who could entitle themselves to share.

On these considerations I must ever hold, that the principle of mere common enterprise alone will not be sufficient ; it is not sufficiently specific, it must be more limited ; and a limitation is here attempted. It is said that The Vestal was detached on a service immediately connected with the object of capture ; this would have been much stronger, if the primary intention on which this [ \* 29 ] ship was detached \* had been absolutely to join Admiral Duncan ; but looking at the letter of Captain Trollop, I find the directions were, " you are to proceed to the first port of England if you do not meet Admiral Duncan, which you are to use your best endeavors to do on your way, &c." By fair construction then, she was not to go out of her way, she was to go to England ; that was the mission, the other purpose was secondary and collateral ; and I cannot think that this ship is to be considered as so much connected with Admiral Duncan as she would have been if she had been sent immediately to join him. But, I would ask again, is there any authority from adjudged cases, or from principles sufficiently established, to show that ships detached from the squadron on views immediately connected with the main enterprize are entitled to share ?

Many cases might be put, in which that position could not be maintained. Suppose a fleet going to besiege a place, and one ship detached to procure provisions and stores, which does not come up and join the fleet till the place is taken; it would be very strong to maintain, that such a vessel, neither present at the commencement nor at the conclusion of the enterprise, could be entitled to share; it has, I apprehend, been decided in practice, that she would not; and the distinction taken was this, that if the ship was sent off for common necessities, after the operations had begun, or if she returned before the object was accomplished, she should be permitted to share, and not otherwise, though her absence was occasioned solely for the purpose of procuring necessities for the service. Then the limitation ingrafted on the first principle, namely, that the detachment is made for an object immediately \*connected with the ser- [ \* 30 ] vice is not sufficient, something more must be added, and that must be the being in sight.

Then the whole turns on this question, Whether the being in sight at the beginning of the chase, in the manner in which that fact is alleged in this case, and in addition to the other circumstance, of being detached on a necessary service, will be sufficient to entitle the parties, as joint-captors? I must inquire, then, What being in sight is necessary? for it is perfectly clear that being in sight in all cases is not sufficient. What is the real and true criterion? The being in sight or seeing the enemy's fleet accidentally a day or two before, will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing, or in preparations for chase, or afterwards during its continuance. If a ship was detached in sight of the enemy, and under preparations for chase, I should have no hesitation in saying that she ought to share; but if she was sent away after the enemy had been descried, but before any preparations for chase, or any hostile movements had taken place, I think it would be otherwise. There must be some actual contribution of endeavor as well as a general intention. Then the question comes to this, Was The Vestal in sight at the commencement of the chase before she separated? if so, it will clearly do; if not, I think as clearly it will not do. On this point, I am of opinion that it cannot be considered as a chase till Admiral Duncan's fleet came up. Captain Trollop dogged the enemy for the purpose of reconnoitring, but he is to be considered rather as the party chased, than as the chaser; with all the gallantry that is to be ascribed to him and \*the [ \* 31 ] other gentlemen with him, he could not be expected to cope with the whole Dutch fleet, and engage in such an unequal contest. When Admiral Duncan came up with the body of the British fleet,

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The Princessa, and La Reine Elizabeth. 2 C. Rob.

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then the chase began, and that is, in my estimation, to be considered as the true point of commencement of actual engagement in this case. Here then is only a general intention on the part of The Vestal; she conveyed no terror to the enemy, nor encouragement to the friend at the time when the rival fleets must be said to have first met each other. It is said the court will not judge by events, but I think the events of a case like this are the facts of the case. The facts of this case, in my apprehension, prove that The Vestal was not in sight at the time of the commencement of the chase, or at any period of it; and, therefore, that she is not in law entitled to share in this capture.

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THE PRINCESSA, Zavala, master, and LA REINE ELIZABETH.

July 2, 1799.

Demand of interest against a Commissioner of appraisement and sale, not sustained.<sup>1</sup>

THIS was a case arising on two Spanish vessels, taken by his Majesty's ship The Sea Horse, Captain Oakes, September 17, 1796, before the order of council for general reprisals against Spain, which did not issue till the month of November in that year. The ships and cargoes consisting of large quantities of bullion and other articles, (condemnable to the crown as taken before Spanish hostilities,) had not originally been taken into the possession of the [ \* 32 ] crown, \*but were left in the hands of the captor, Captain Oakes, who put them under the care of his private agent, Mr. Marsh. Condemnation passed to the crown on the 3d of August, 1797, and the property was put into the hands of commissioners appointed by the court, on the recommendation of the crown, to superintend the appraisement and sale, Mr. Marsh, the private agent of the captor, being one. The commissions issued on the 23d of August, 1797, and were made returnable on the first session of Michaelmas term following; but the first payment had not been made till the 4th of April, 1798, and the whole payment was not concluded till the 15th of August in that year. The present question arose on an application of the crown officers, that Mr. Marsh, in whose hands the bullion had been originally placed by Captain Oakes, might be directed to account

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<sup>1</sup> [The Rendsberg, 6 C. Rob. 155, 171; The Fortuna, 4 C. Rob. 78.]

for interest thereof, upon information conveyed in the report of the other commissioner.

JUDGMENT.

SIR WILLIAM SCOTT. This is a matter which has been depending a considerable time before the court, and, in my opinion, much longer than a business of this kind ought to have depended ; for such things as the execution of commissions of appraisement and sale, ought to be proceeded on with all possible despatch, and brought to a conclusion without delay ; and the court is particularly indisposed to suffer suits to be engrafted on disputes between its own officers, to the delay and disadvantage of the parties interested in the principal cause. At the same time it is impossible to say that occasions may not arise in which \*it may be necessary for [ \*33 ] the commissioners to stop short, in order to apply to the court for instructions. The application, when necessary, should be summary in such a case, and the directions will be given summarily. I need not add that returns to commissions must themselves be short and simple, and unembarrassed with foreign and insignificant matter. They are merely to give the court information of the necessary facts, upon which the court will exercise its judgment, if any question should arise out of them. Both commissioners are necessarily before the court, and, therefore, to talk of the intervention of a commissioner, in objection to the report of the other, or for any other purpose, is improper. An objection has been made to the return of one commissioner in this case, and I have allowed an act or statement to be drawn, and that commissioner to be heard by his counsel ; but this merely for my own convenience, in considering the nature and effect of the objection taken to his return, and not as a matter of right, by any means, nor as a thing to be admitted into the ordinary practice of the court. When they have made their returns they are *functi officio*. If the court wants explanation it will require it of them ; but they have no right to press arguments upon the court, nor to form a regular suit, which is to hang up the interests of those who are really concerned in the property.

Having premised these observations, I will say a few words, first, upon the authority of commissioners ; secondly, upon the interests of commissioners ; and thirdly, upon their duty. I think I can see a necessity for taking some notice of these points, upon the present occasion. With regard to their authority, I \*con- [ \*34 ] sider them merely as the ministerial officers of this court, deriving all their authority from this court, and from no other source ; and I have been the rather led to mention this, because I think I

observe a notion has been picked up, that they are the agents of the persons that recommended them; and therefore, in this case, the agents of the crown, immediately for its interests, crown officers and public trustees. The whole of this notion is unfounded, according to my apprehension. They are appointed by the court, to perform those functions of the court in which it cannot act for itself; they represent the court in the same manner as the commissioners for taking examinations, or for any other purpose. The court may accept the recommendation of parties, for its own convenience, in the same manner as the bishop usually accepts the creditor who has obtained a judgment to be the actual sequestrator, though in no degree bound so to do. It is a matter in the voluntary discretion of the court. No party can have a right in such a matter, for this simple reason—that no person can have a right to appoint a representative for another. It is the court which delegates its functions; it is at the option of the court whether it will grant any commission or not, and to whom it will grant it; it may revoke commissioners, though approved by the party; it may continue a commissioner in office, though against the approbation of the party; they are in all cases to account to the court, and not to the persons that recommended them. There can be no doubt but that the court will, with

the most reverential deference, be disposed to appoint any [ \* 35 ] person recommended \* by the crown, for the care of its interests; but the court would be guilty of no misfeasance, if it granted no commission at all; and when they are appointed, they stand on the same ground as other commissioners, and are to look to this court for their proper discharge.

In the next place, what is the interest of commissioners? I have no doubt that the court might, in the first instance, assign the proportion of payment at the time of appointment, and might enlarge or otherwise alter it afterwards, as it should think proper, according to the circumstances of the case. By courtesy, it has been usually otherwise; and to prevent disputes, and to suit the general convenience and wishes of the parties, it has been usually left to them to agree on their own terms, usually a percentage; but when that agreement has been made, I hold the parties are strictly bound by it, and that the commissioners are not allowed to make a sixpence advantage, beyond that percentage, which is settled in the agreement. To employ the proceeds for themselves, or for their friends, to sell subordinate offices, or to carve employments out of them, would be irregularities, and abuses and breaches of that purity with which their trust should be exercised. Such advantages may be taken in fact, and I fear sometimes are, but they will not be tolerated by the court, when they are brought to its



notice ; and commissioners must understand, that if they send out that money, which relatively to them is the money of the court, either for the benefit of themselves or for the benefit of their friends, the court will not hold them guiltless, or repute them to have rendered a due execution of their trust. And \* I desire to lay [ \* 36 ] this down as a rule for the conduct of all commissioners, that the only advantage which they can legally make, is that which is allotted to them by the court, or is settled in agreement between the parties and them.

I come now to the duties of commissioners. They are, according to the terms of their appointment, "to reduce into writing a full, true, and perfect inventory of the ship and cargo, and to choose two good and lawful men, well experienced in such affairs, and swear them faithfully and justly to appraise the same according to their true values, and to cause the aforesaid ship and cargo to be exposed to public sale, and to sell, or cause the same to be sold, to the best bidder, and to bring, or cause to be brought, the produce money arising from such sale, into the registry of the court before a certain day."

This is the simple line of their duty. It is possible, undoubtedly, that difficulties may arise in the execution of their office, but then to whom are they to resort ? To the court, their constituent, whose officers they are, and whose functions they execute. This is their resort, and they mistake their way if they go to private persons, here or elsewhere, to be informed in what manner this court expects its own commissions to be executed. As to any thing that concerns the interests of the crown, in such commissions, they have the assistance and advice of the King's Advocate, the Advocate of the Admiralty, the King's Proctor, or the Proctor of the Admiralty, according to the particular course of their business. It is the duty of commissioners for the crown to apply to them, and to act under their direction with respect to the \* crown's property. If those officers [ \* 37 ] see a necessity for an application to the court, it will be made ; if not, the commissioners will be safe in following their instructions. If an application is necessary to be made to the court, it should be made in due time, and whilst the difficulty is pending and capable of cure, and not be left to a late period, to rip up the whole proceedings of the commission, after everything is finished. Thus, if one commissioner thinks the other encroaches or usurps too much authority, he should apply to the court in an early stage, and not wait till the business is concluded, and then call on the court to travel over the whole again, in order to set that matter right ; and as to interest of money, I can hardly conceive that any dispute can with propriety arise on that ground between commissioners, neither of them

being entitled to make a sixpence more than the percentage which is given by the agreement under which they set out; and as to the principal parties, if an application is necessary to obtain the use of the money, it should be made to the court, whilst it is in its power to prevent the mischief. Interest is a subject on which the jurisdiction of this court has always been very tenderly exercised. It will, on that account, be more desirous to prevent the question from arising, by preventing interest from accumulating; and, therefore, it is extremely necessary that the matter should be brought before the court, for the prompt payment of the money, whilst it is capable of that easy and natural remedy, and that it should not be suffered to go on, with the hope of bringing up, a question of interest, when it may be very difficult for the court to enforce an order that will be effect-

[ \* 38 ] ual \* for a remedy of that species. I say the more on this subject, because it does appear that the whole of this unpleasant business has arisen from an inattention to that proper method of proceeding in such a case. The commission that has issued in this case was made returnable in six weeks, yet no return was made by either commissioner for sixteen months; and I understand that a practice has prevailed, by some accident or other, of making no payment till the whole money can be paid in; so that it may happen that 50,000*l.* ready to be paid in at the end of the first month, shall be kept for sixteen months, till 1,000*l.* more outstanding can be brought to account. One peculiar incongruity produced by delay in this case, is, that the beneficial interest has very much shifted hands during its pendency; for the crown, which had originally the whole interest, has retired into a corner of the case, having granted away two thirds of the proceeds; and yet here is the crown, praying interest on the whole sum, although the party entitled to two thirds, both principal and interest, if any interest is due, is totally quiescent.

I come now to state the facts of the case; it arises on two Spanish ships captured, with a quantity of bullion, before Spanish hostilities, by Captain Oakes, who is since dead. In the critical state of affairs between the two countries at that period, the crown declined to take the property into its own hands, or to institute any proceedings against it. It was some time doubtful whether it would not be entirely restored; for it was the subject of long negotiations, to my knowledge, whether all the property, taken on both sides

[ \* 39 ] during that time of suspended hostilities, \*should not be mutually restored; it however did not take place. Captain Oakes was left in possession of these valuable cargoes, either as the agent or steward of the crown, or as a person left to act according to

his own discretion. He landed the bullion,—if this had been done in the ordinary course of prize, and whilst any cause was depending on it, it would have been a great irregularity; but I am not to apply the ordinary proceedings of the Prize Court, to a transaction which at that time was not decidedly in the nature of prize. The bullion was landed, and very properly deposited in the bank; it was then converted into specie by the order of Captain Oakes; irregularly again, if a cause had been depending; but still with the best intentions, and, as the event has proved, advantageously for all parties. Under these circumstances, I can by no means consider Captain Oakes, or his agent as *mala fidei* possessors. Captain Oakes had a just title to the original possession, by a capture which has been confirmed by a sentence of condemnation; during the intermediate time he was continued in the possession; as I conceive the crown usually leaves the possession of such property (although it is legally entitled) in the hands of the captors or their agents. The conversion which took place during this time, was done upon the best motives, and to the best actual advantage; there was nothing, therefore, to change the *bona fidei* possession; and, therefore, I must pronounce them acquitted of any malfeasance in this proceeding.

The case divides itself into two periods; and, it is argued, first, that the court will decree interest against the commissioner, from the time of the conversion into specie; but against [\* 40] this I think I see many decisive objections. In the first place, against whom must I decree it? If against anybody it must be against the captors themselves. Mr. Marsh was not at that time a servant of the court, nor a known prize agent recognized by this court; for no war existing with Spain, he was not a public agent, under any prize act applying to Spanish hostilities. He was a mere private agent of Captain Oakes, and as such he might be answerable to his employers; but I have nothing to do with that. My demand must be against Captain Oakes, for his private agent's possession. But I should be glad to know if any instance can be found, in which the court has called on captors to pay interest for money, which the crown has chosen to leave in their possession; and more particularly in a case like this, in which the crown has granted away two thirds of the principal sum out of its hands, and to those very captors. And suppose the court was ever so well disposed to decree interest upon the particular circumstances, it would be utterly impossible for the court to travel back beyond the date of the commission. On a petition merely respecting a commission of appraisement and sale, I could not direct interest, on this part of the case, upon the present application; therefore, I lay that entirely out of consideration. It is

then said, secondly, that interest must be obtained for the time subsequent to the grant of the commission. The commission issued. What was then the duty of the commissioners? I must say that if one commissioner was possessed of 40,000*l.*, or any considerable sum, it was his duty to have brought that circumstance to the [ \* 41 ] knowledge of the crown officers. It might be too much to expect him to bring it in voluntarily, whilst there was no order upon him to that effect; but if the crown officers had been aware at the time of issuing the commission, that such a sum was in his hands, and they had intimated, as they undoubtedly would, that he should immediately pay it in, he should have given immediate compliance with that demand. That he was absolutely bound to communicate, I do not know that I am legally entitled to say; for if it had even been money which had come to his hands under the commission, still the commission, in its terms, empowers them to execute the business "jointly and severally." And though the court, to prevent confusion and embarrassment that might arise from separate actings, and likewise to increase the security of the property, would always require that they should proceed hand in hand; yet I do not know that a legal obligation exists, independent of any order made by the court, for the one commissioner necessarily to divide the possession of every sum of money he has received with the other. But certainly that obligation exists less, in a case where he was in possession of that sum of money, not by virtue of the commission, but by virtue of his having been many months before the private agent of a private person, the actual captor, who had placed it in his hands, when the crown declined meddling with it, long before the institution of any suit respecting it. However, an intimation ought to have been given to the crown officers. It was not done; and if I had reason to conclude this was fraudulently omitted, the court would strain hard to make the commissioner answerable if any loss had occurred.

[ \* 42 ] \* I will state my reasons why I do not hold him answerable.

The commission was granted on the 23d of August, and made returnable on the first session of Michaelmas term, 1797. No return was made by the commissioner, nor was any application made to get the proceeds paid in; there was an error, and a most material error it has been in substance; for to my own knowledge, the intention and design of granting the commission in this particular form, has been in some measure counteracted by it. The business might have been transacted by commissioners immediately appointed by the treasury; but it was thought more expedient to put it into this form of commissioners from the Court of Admiralty, in order that the process of it might be immediately and constantly within the view of the court till the con-

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*The Princessa, and La Reine Elizabeth. 2 C. Rob.*

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clusion ; and that conclusion might be accelerated as much as possible, without leaving the hazard of any after-reckoning, to be adjusted between the treasury and the commissioners ; and it certainly was hoped, that a very short time would have sufficed for these purposes ; whereas, it has taken up sixteen months before any return whatever was made by either commissioner. This is an error, material likewise in its consequences ; because if the returns had been made at the time prescribed by the commission, it would have appeared, that a very large proportion of proceeds had already been received by one of them, and of course would have been then ordered into the registry of the court, there to await an order for the distribution. What prevented the report of the then King's Advocate, upon the application of Captain Oakes's family ? The ignorance of the value of the proceeds, in consequence \* of no return having been made. [ \* 43 ]

What stopped the distribution ? The very same cause.

Whereas, if the return had been made, and the proceeds ordered in, that gallant officer would have died, with the satisfaction of knowing, that the difficulties with which his family was for some time oppressed, would be speedily relieved, by the liberality of the crown, in the grant and distribution of a considerable part of this property. It is impossible, therefore, to say, that it is not extremely to be wished that the matter had been otherwise conducted in this respect. Whether it has been so misconducted, as to subject the party to any penalty, is another consideration ; if any penalty is due, the mere payment of interest is as slight a one as could be applied. But before I go so far as to apply it, the court must be satisfied on two or three points. It must know that it has authority to direct interest to be paid ; for unless that is shown, all speculations on the propriety of directing it, will be superfluous and idle. Now it is a pretty strong argument against this authority, that no instance has occurred, either in this court or in the Court of Appeals, in which the demand of interest, even against an agent, has been entertained. In Mr. Ker's case, the application was for the payment, not of the interest, but of the principal ; and Lord Camden said, that if he had authority, he would order interest ; that was against the agent of the party. This case, is the case of a commissioner ; and if no case can be produced, in which the court has decided on the liability of a commissioner to pay interest, it does, I think, go far to prove that the court has not the power, as occasions probably have occurred for such an order.

\* It must then be a strong case, that would induce the [ \* 44 ] court to make the experiment ; for I will not say that the court would, in no case, entertain and attempt to enforce the demand. I can suppose a case, of a commissioner, fraudulently and pertina-

ciously detaining money, and resisting the order of the court to bring it in ; then, indeed, the court might be induced to take the opinion of another jurisdiction upon such a decree ; but it would not do this, on slighter grounds than a clear case of misconduct. It would not exercise this questionable jurisdiction, where there is no such clear imputation on the person.

Then how stands the case as to misconduct ? Looking abstractedly to the facts, I might think there had been some misconduct ; but looking to the relaxed practice of the court, and finding that the practice had been ordinarily the same, how does it stand then ? Suppose a gentleman to come to the exercise of his commission, without any particular knowledge of the rules of practice of this court ; suppose him to come, not as a lawyer, but as a person merely used to the employment and management of money ; the persons whom he might naturally have consulted, would probably have told him, that it was not at all necessary to pay in the money till the whole was liquidated, for that such was the ordinary practice of the court. Looking at the character of the gentleman concerned, and supposing him to have received such information, I think it would be too much, to expect such a person to decide for himself, that this practice was wrong ; and that he would not be safe in conforming to

it. However disposed I may be to censure this practice [ \* 45 ] and correct it in future, it would seem too \*hard to lay down, that here was special delinquency that called for penalties. It is a bad sort of reformation, which begins by an act of vindictive justice, on a person, who has been acting only as every other person has been permitted to act, under such circumstances. In this, I cannot be understood to throw the slightest reflection on the learned persons, who have had the management and direction of this court before me. I am sure that that honorable person, who immediately preceded me, would have expressed himself as I have done, if the fact had come to his knowledge. But the truth is, that such things do not ordinarily come to the knowledge of the court. I have practiced in these courts above twenty years ; and though I may appear to betray great inattention, I profess I never was aware, that commissions were not returned at the time appointed ; and I might have sat here, above twenty years longer, in the same ignorance, if this particular case had not made it my duty to remark, and to correct such a practice in future.<sup>1</sup> On the ground of particular delinquency then, I see no reason to charge this gentleman with interest. I cannot say, referring to the common current of practice, that there has been a

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<sup>1</sup> [See the order of court, vol. i, p. 187.]

fraudulent withholding of the principal ; but it is said, that although he is not held to be penally liable to pay interest, yet interest is to be computed as part of the proceeds, and, therefore, ought to be paid. Now it is, I think, first necessary to show that interest was made by him ; it is said, that he placed it in a banking-house, of which he was a partner ; and that the inference is, that it was not sleeping or lying \* dead there. But suppose he had put it into any other [ \* 46 ] house, would he have been liable in that case ? In chancery I presume he would ; for as it is the practice of that court, to put moneys depending in it out to interest, a person preventing that interest from accruing, might be required to pay without proof that he had personally made interest and even if he could prove that he had made none. But it has never been the practice of this court, to order the money of suitors to be put out at interest, except upon their joint application and consent. The money is paid into the registry, to wait the order of the court, and, therefore, I should think it impossible to decree interest, unless interest was actually proved to have been received.

If I am right in that matter, the commissioner can be answerable only in his collateral character of a banker ; but, in that capacity, how could I order him to pay more than his own particular share ? His partners would stand, in this case, as any other bankers to whom he or any other commissioner had confided it. And how is this court to ascertain what that share is, whether a moiety or a thirty-second part only ? I should, in such an attempt, travel much out of the usual province and occupation of this court. Adverting to all these considerations, is it proper that the court should call on him for that share ? The court must again be first clearly convinced of its authority ; for it would not proceed to exercise a dubious authority, unless on very strong grounds, and more especially, unless it appeared that the party calling for it was well entitled. The only party appearing before the court to call for interest is the crown officer. Has the crown the title to this interest, if the court could decree it ? Only to one third of it ; for the two thirds, if received, have been already granted out to the \* captors, who do not join in this [ \* 47 ] application, but are content (as far as their conduct speaks,) that if any such advantage has been made, it shall remain with the commissioner who was their original agent or manager. What then would be the whole effect ? That, if the court could comply with the prayer, the crown would be entitled to one third of that interest, which must be deemed (if it can be ascertained) the particular share of this commissioner's interest, — received by him, as one of the partners of this banking-house, — after the time when the commission ought regularly to have been returned.

Upon this statement of the case, although the application has been made with great propriety by the crown officers, I shall not attempt to exercise a new and questionable authority, in a case where the party possessing double the quantity of beneficial interest which the crown has retained, declines to join in the application, where the result of advantage to the crown can be but inconsiderable, and where the aid of the court might have been called in with effect, in an earlier stage of the business, in the simple and natural process of compelling a return.

On these several grounds, I decline to sustain the demand for interest on the part of the crown officers. With respect to any dispute between the commissioners, upon the matter of their claim to the benefit of interest, I have nothing to do with that. Whether any other court would sustain a demand on the part of one of them, against the other, for a participation of interest, when neither is entitled to any interest at all, is more than I am able to say, and more than I am called upon to conjecture. This is my decision; and

the use which I shall make of the whole proceeding (and [ \* 48 ] \* a very important one it is) will be to prevent such a grievance from occurring again. It is high time that this abuse of not returning commissions at the proper time should be corrected. I mean no imputation on any individual. Everybody knows how abuses insinuate themselves at first, and creep on by degrees. They begin, usually, in some act of accommodation and kindness, which we can hardly disapprove in the particular instance; the same facility is practised, in a second instance, on little other ground than the precedent of the first. An irregularity which was hardly censurable ripens into settled abuse. New men come into office, and they find it become an ancient established practice, with all the sanction of gray hairs upon it; one abuse begets another, (for it is a prolific family,) till at last attention is awakened, and those who have authority are loudly called upon by duty to correct them. They are memorable words of Lord Bacon upon such subjects, "that time is the greatest innovator; and if time always alters things for the worse, and wisdom and counsel do not sometimes alter them for the better, what shall be the end thereof?" In making these necessary alterations, I know I shall have the assistance of the crown officers in this court, as far as the property of the crown is concerned; and in respect to private property, the court may in general rely on the vigilance of the parties themselves, stimulating their agents to the performance of their duty by the aid of the process, which shall at all times be readily imparted. And if such consequences follow, it may be fortunate for the public that such a case has arisen, though some unpleasant circumstances may have attended the discussion.



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The Princessa. 2 C. Rob.

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\* IN THE PRINCESSA, Zavala.

[ \* 49 ]

August 30, 1799.

A claim of a British merchant for dollars, documented as Spanish property, on board a Spanish ship from Buenos Ayres to Spain, not admitted.<sup>1</sup>

A SECOND question arose, on a subsequent day, on the claim of a British merchant, for a quantity of dollars shipped at Buenos Ayres, by his asserted agent, and for his account, but ostensibly entered in Spanish names, on board a Spanish ship, and bound to Corunna, in Old Spain. The affidavit of the claimant set forth the following circumstances.<sup>2</sup>

" That some time in the years 1790 or 1791, one of the partners of his house being at Madrid, purchased from a Portuguese merchant, an order on the treasury of his Spanish majesty at Buenos Ayres, for the number of 6,000 hard dollars, which the said merchant had recovered from the crown, on account of an unjust seizure that had been made of his property ; that the appearer's said house appointed Ramon Ramon Diaz, a merchant at Buenos Ayres, their attorney, to receive the money, who, as this appearer has been informed, and believes, received the same from the treasury, in virtue of the said power of attorney and order ; but, instead of remitting the same to this appearer's house, appropriated the same to his own use ; that this appearer's said house, in consequence, through their correspondent at Corunna, Don Felipe Gonzalez Pola, appointed Don Antonio de la Cajigas, merchant at Buenos Ayres, their attorney, to recover the said 6,000 dollars with interest from the said Ramon Ramon Diaz ; that on or about the 14th of July, 1796, this appearer's said house \* received from the said Don Antonio de la Cajigas, [ \* 50 ] a letter, dated Buenos Ayres the 3d of March preceding, informing them of his having, through their aforesaid correspondent at Corunna, received their power of attorney for the purpose aforesaid ; that he had procured from the said Ramon Ramon Diaz 2,000 hard dollars in part payment of the said debt, and laden 1,000 dollars on board

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<sup>1</sup> [No claim is admissible in opposition to the ship's papers. The Diana, 2 Gall. 96 ; The Orion, 1 Acton, 205. But there are some exceptions. See La Flora, 6 C. Rob. 3 ; Vrow Elizabeth, 5 C. Rob. 2. This rule does not apply to shipments before the war. The Vrow Anna Catharina, 5 C. Rob. 15 ; The Jan Frederick, 5 C. Rob. 128. But it does to those in contemplation of war. Ibid.]

<sup>2</sup> Sworn 31st May, 1797.

the Rey, and 1,000 dollars on board the Cortes, being two packets, for their account, consigned to their said correspondent at Corunna; that on or about the first day of August, in the said year 1796, they received a second letter from the said Don Antonio de la Cajigas, dated at Buenos Ayres the 28th April preceding, which was forwarded to Corunna by the packet Alcudia, confirming the former letter, and advising them that 2,000 more dollars were laden on board the said packet for their account, consigned as aforesaid, and further advising them, that he could consider the whole as recovered, which he hoped would be verified by the next packet *La Princessa*; that in consequence of such advice, this appearer's said house caused an insurance to be made at Lloyd's, to the amount of 2,000 hard dollars, on board a packet or packets from Buenos Ayres to Corunna; that on or about —, last past, this appearer's said house received a letter from the said Don Felipe Gonzalez Pola, dated Corunna, — March preceding [1797], informing them that he had received advice from the said Don Antonio de la Cajigas, that 2,000 dollars had been laden for them on board the packet *La Princessa*, which had been taken as prize, and carried to Portsmouth. And this appearer [ \* 51 ] \* further says that 2,000 hard dollars, laden and on board the said packet *La Princessa*, at the time when, in the prosecution of her said voyage from Buenos Ayres to Corunna, she was taken and seized as prize, did belong to him, &c. &c."

## JUDGMENT.

SIR WILLIAM SCOTT. This case stood over, for the judgment of the court, on the claim of Mr. Dubois, a merchant of this town, for a quantity of dollars put on board a Spanish ship at Buenos Ayres, and to be landed at Corunna, in Old Spain. The account given is, that a partner of the said house had, in the year 1791, purchased an order of the king of Spain on the treasury of Buenos Ayres, which had been received there, and detained by the agent of the claimant; but, being recovered by a special application, this was a remittance of part of the sum. On looking into the papers, it appears by the manifest that the money was put on board, as the property, and for the account and risk, of a merchant in Spain; and the master verified the papers as true and fair, and swore "that they contained a real representation of the property." By the papers, therefore, it appeared as Spanish property, and as confiscable to the king, being seized before hostilities with Spain; but it is argued that, notwithstanding these appearances, it would be very hard that the property of a British subject should be condemned upon them, the shipper at Buenos Ayres being ignorant of the real transaction, and of the state in which

the real interest stood, knowing nothing of the real owner, and looking only to the consignee at Corunna; and it is said that there \* have been cases in which the court has allowed an [ \* 52 ] averment, and a claim to be set up, in opposition to the original papers. It is said, also, that this is not a register ship, but a mere private ship with private papers; but I think it does appear, that if it is not a register ship, yet it is so nearly of that description, as to be exclusively appropriated to Spanish trade. It is a Spanish frigate employed as a packet of the King of Spain, to bring bullion and specie from South America to Old Spain; and I think the presumption is most strong, that none but Spanish subjects are entitled to the privilege of having money brought from that colony to Spain. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of Spaniards; therefore, it appears that this is not an ordinary trade; and I must take this to be property, which must have been considered as Spanish, and which could not have been exported in any other character. It has been decided by the Lords in several cases, (that are so well known, that without naming them it will be sufficient to advert to the general principle,) that the property of British merchants, even shipped before the war, yet if in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects as that no foreign name could appear in it, must take the consequences of that character, and be considered as Spanish property; and I think I may safely go the length of considering this ship, under the description which I have given of it, as coming under the operation of that principle.

But if it was an ordinary trade, with an ordinary bill of lading, and taking it on a more lax principle, \*it would be [ \* 53 ] impossible to pronounce on this affidavit, and claim, that it is the property of the person for whom it is claimed. It is said that the shipper was ignorant of the person standing behind the Spanish consignee; but how can this be maintained consistently with what is stated in the affidavit? The transaction arose on an authority given to recover the amount of an order on the treasury of Buenos Ayres, purchased in Spain, and the first agent delegates his authority to another; but there must have been an intercourse between the original and the substituted agent; and the shipper at Buenos Ayres must have been apprised that the debt was due to British merchants, and that the persons at Corunna were merely agents for them. The foundation of that solution then totally fails. He was a correspondent, and the continuance of the correspondence shows that the shipment could not have been made in this form through ignorance. Mr. Dubois farther states, "that he had received advice of shipments of part of

the money owing to him on board other packets; and that 2,000 more dollars would be shipped in this packet for his account." It appears from this passage that there was not a single dollar shipped on this account otherwise than in packets; and this strongly confirms me in considering this trade as an exclusive and appropriate trade. The letters are not produced, but the affidavit state "that the correspondent informed him, that he hoped to settle the account by The Princessa;" and all that he is able to state, is, "that he had received an account that 2,000 dollars would come on board The Princessa."

The Princessa is taken, and the inference is, that he had [ \* 54 ] received no intimation of the actual shipment till after the ship was known to have been captured, and then it comes not from the shipper, but from the merchant at Corunna, in whose name it was shipped.

Now is there any paper on board to show that it was in satisfaction of a British debt? Every paper points to Gonzalez, at Corunna, as the owner. And what is there to show that this person who recommended the agent to Mr. Dubois, might not have concerns of his own, and shipments made for him, through the hands of that agent? I think there is reason to suppose that Mr. Gonzalez endeavored to shift off the interest in the money captured on Mr. Dubois; and, I therefore think, there is no more reason to convince me that the property belonged to Mr. Dubois, than there is authority to satisfy me on the point of law. I am under the necessity of condemning this property; but as captured before Spanish hostilities it will be condemned to the crown, to whose liberality Mr. Dubois may still resort, if he can make out his claim; but I feel myself bound to add, that unless Mr. Dubois can give better proof, than he has made before me, he can have no great right, as far as I am capable of judging, to expect the recommendation of those persons whom the crown usually consults, in support of his claim.

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\* THE DORDRECHT, Admiral Lucas.

[ \* 55 ]

July 9, 1799.

A claim of joint-capture, on the part of land forces, asserting to have coöperated in the capture of the Dutch fleet in Saldanah Bay, rejected.<sup>1</sup>

THIS was the flag ship of a Dutch squadron, captured by Admiral Elphinstone in Saldanah Bay, August the 17th, 1796. The cause came on, to determine the question of joint-capture between the British fleet, and the land forces from the Cape of Good Hope, asserting, to have coöperated in the capture.

The substance of the several articles of the allegations on the part of the army having been opened,

The *King's Advocate*. It may perhaps save much time to state at first, as the opening on the part of the navy, the grounds on which it is intended to resist this claim. The navy is, we submit, alone entitled to the benefit of this capture on these grounds: It is a capture of a ship at sea, in no degree protected by any land forces; it is made by a fleet at sea, and, as such, is to be considered as a pure naval prize. The claim on the part of the army is unprecedented; no instance can be produced of a similar claim. To support the principle of joint-capture between the army and navy, it is always required that some direct and actual assistance shall be shown to have been given, not merely for the purpose of preventing destruction, but for the purpose of compelling the surrender. There is no such assistance afforded in this case by the army, nor is it proved that they contributed in any degree, even to prevent the destruction of the Dutch fleet. It is pleaded for the army that there was a preconcert, but no such \* thing is established in proof. There [ \* 56 ] was some communication of intelligence, but such, as being unfounded, rather retarded than facilitated the conquest. On the 12th of August there was a letter from Mr. Trail to Admiral Elphinstone informing him that the Dutch were in Saldhanah Bay; but that gentleman received his intelligence from a naval officer, and from that day till after the surrender, there was not only no preconcert, but no communication between the admiral and General Craig. It is material to advert to the situation of the Dutch fleet. The *Bellona* and

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<sup>1</sup> [Other cases respecting joint-captures by land forces are *Stella del Norte*, 5 C. Rob. 349; *Booty in the Peninsula*, 1 Hagg. Ad. R. 39, 43; *French Guiana*, 2 Dod. 151.]

The *Havic*, two frigates, were placed nearer in towards the shore for the purpose of watering, and some shots were exchanged between these and the advanced guard of the army; but the rest of the squadron were at too great a distance to be annoyed by the army. Admiral Lucas says, "That if the English fleet had not been there, he should have placed his squadron quite out of the reach of the shore."

Admiral Lucas received the first summons about eight o'clock in the evening of the 16th of August. There is no allusion to the army either in that, or in the answer of the Dutch admiral. On the night of the 16th a council of war was held; and it is material to ascertain the time of the arrival of General Craig's letter, because it is said that it arrived before the capitulation. It appears that it reached Admiral Lucas about ten o'clock on the morning of the 17th; but, according to the evidence of Admiral Lucas's secretary, "The white flag was flying early in the morning, and a Dutch officer was sent to Admiral Elphinstone about an hour or two before General Craig's letter arrived." Admiral Lucas states, "that he was informed by

[ \* 57 ] \*Admiral Elphinstone that he had concerted measures with

General Craig;" but that must be a mistake, for General Craig's letter to Admiral Lucas begins, "Although I have had no communication with Admiral Elphinstone, yet from signals I am induced to believe that a negotiation is going on between you." Admiral Lucas states the wind to have blown a heavy gale from the South, the army was posted to windward, so that it would have been impossible to have run the fleet on shore in that place; and it is further stated that just where the army lay, there were sand-banks which would have prevented the measure. In a case of this sort, where the chief reliance of the gentlemen on the other side, is on the intimidation which they assert to have been produced on the Dutch fleet by the presence of the army, it will be material to show the impression of the captured. It appears, on the ninth article of the allegation, that Captain Rymbende thus addressed his crew: "My lads, we have taken care of your wives and children, and you shall be sent home. We have been obliged to capitulate because the English fleet is too strong for us." Nothing is here mentioned as a cause of the surrender but the superiority of force; and it is only necessary to advert to their comparative force, to show that every other consideration was unnecessary. The Dutch had nine ships, three only being of the line; the English fourteen, of which eight were of the line. In addition to this superiority, it is said by Admiral Lucas, "That one inducement to surrender arose from the mutinous disposition of the Dutch crew, who declared they would not fight the English squadron." These are the grounds on which we mean to con-

tend, that in \*fact the surrender was to the British fleet [ \* 58 ] alone; that the British fleet was abundantly competent to enforce the surrender; that the army did not, and could not have annoyed the fleet; that the inducement arising from intimidation from the army is a mere afterthought; and that therefore taking the whole of these facts, together with the principle of law which governs joint-capture, the army have not entitled themselves to be considered as joint-captors in the present case.

For the army, *Arnold* and *Swabey*. In arguing this case on the part of the army, it may perhaps be convenient to state distinctly at first, some points which it is not meant to contest. In the first place, it is not contended, that the army could, of its own force, alone have taken possession of the Dutch squadron; it is not denied, that the British fleet was of itself fully sufficient to have made the capture; neither is it denied, that the actual and formal surrender was made to the admiral, without any mention in the articles of capitulation, of the general, or of the troops under his command. But the fact on which it is intended to rely is, that the army contributed to the intimidation of the enemy, that the capture was occasioned partly by that intimidation, and, therefore, that the army are entitled, in virtue of that effective assistance, to be considered as joint-captors. To prove the facts on which this claim is to be sustained, no better evidence can be produced than that of the captured persons; they are witnesses without bias, of interest, or partiality, or prejudice, towards either of the parties. They are usually considered as the most credible witnesses in all cases of this kind, because they are called to speak to \*facts which were the objects of their own senses, [ \* 59 ] and to explain the impression of their own minds. They are called to say, whether the force which claims a share in the capture, was actually within their sight at the time of capture, what effect their presence produced, and how far it made a part of their inducement to surrender. These are facts to which these persons are not only the best witnesses, but they are the only witnesses which can be produced; no man can speak of the impressions of another's mind, nor of his motives. They are, therefore, the only witnesses that can give satisfactory information on those points. In respect to the preparatory measures which were taken, there is the evidence of some officers in the army who have released their interest, and are, therefore, competent to give testimony in this cause. From the evidence of these gentlemen it will appear, that, it being generally understood at the Cape of Good Hope that a Dutch squadron would soon arrive in those seas, preparations were made, by the establishment of posts

and of relays of cavalry, to communicate the intelligence of their appearance as quickly as possible. By these means the intelligence was received where the admiral and the general both were; and the admiral set sail in quest of them, although he did not at that time fall in with them. In the meantime more particular information was received by the general, that the enemy were in Saldanah Bay. It is proved that General Craig made every exertion to communicate this intelligence to the admiral; and that he sent a signal, which he

desired him to make on entering the bay, and another which [ \* 60 ] he promised to return in answer to it, from the heights. \* It

is proved, therefore, that in this respect he took those steps which were most likely to conduce to the capture. He besides made preparations to coöperate with the fleet, and sent in the first instance a small detachment, who were not idle spectators, but communicated the intelligence to Cape Town, and harassed the enemy in their operations. It appears, that this party prevented the enemy from receiving supplies of cattle, which were actually driven down to the beach for their service; and besides, that they prevented that communication between the fleet and the shore, which must have afforded information to the enemy, that an English fleet of superior force was expected, and must by that means have given them an opportunity of making their escape. In this respect, therefore, the precautions taken by General Craig were essentially contributing to the success of this capture. But a much larger force arrived soon after; and it is proved that they arrived with two field-pieces, and two howitzers, about eleven o'clock in the morning of the 16th of August, some time before the fleet. The effect of their arrival was immediately felt by the enemy; for it is proved, that the parties which were sent on shore for the purpose of watering, were immediately obliged to return. There was also a cannonading between the advanced guard of the army and The Bellona, from which she received considerable damage, and it is the opinion of the Dutch admiral and several other witnesses, that it was in the power of the army to have destroyed her.

These are the only offensive operations which took place during the whole time; and it appears that they contributed very [ \* 61 ] materially to the capture; for \*immediately on the arrival of Admiral Elphinstone, he sent to summon the Dutch admiral to surrender, and not receiving an explicit answer in the first instance, he made it a peremptory condition, on granting further time, that no damage should be done to their ships. This promise was given, according to Admiral Lucas's evidence, merely because he perceived from the situation of the English army, that it would be impossible to run the ships on shore without exposing the crew to



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certain destruction from the army. It was under this impression only that the promise was made; for although the articles of capitulation were proposed by the Dutch, it is expressly sworn by Captain Rynbende, that they were proposed only to gain time, and not with any view of acceding to an actual surrender. The situation of the Dutch fleet was one of the most distressing in which brave men could be placed. They could have no great hope of success, in daring an engagement with a superior fleet; and from the position of our army, they found themselves cut off from the performance of that next duty which their country demanded of them—to diminish the benefit of the victory to the enemy, as much as possible, by destroying their ships. In this perplexed situation, they received a letter from General Craig, which convinced them that their apprehensions from the army were not groundless. It was a letter announcing to them “that if they attempted to run their ships on shore they would receive no quarter.” From this moment their measures were decided, and they immediately acceded to the terms which Admiral Elphinstone had proposed.

In this instance, therefore, General Craig appears to have coöperated with the fleet in the most effectual manner. [ \* 62 ] No engagement took place on either part. The force on the part of the navy, was a force of intimidation only; it was a force which was only represented and displayed. The force of the army was displayed likewise, and with effect, in this denunciation; and it is acknowledged by Admiral Lucas and the other Dutch officers, that it was from their apprehension of the army, in a great measure, that the council of war, held on board the admiral's ship, were induced to submit to a surrender. It is pretended that the expedient of running on shore was not practicable, owing to the surf which ran there, and on account of the sand banks at that point. But with respect to these, it is obvious that they were attended with danger, rather to the ships, than to the crews; and that danger was precisely the destruction, which the council of war meditated, if they had not been prevented, by the apprehension of personal danger to themselves. It is said also, that another material inducement to surrender arose, independently of any consideration of the army, from the mutinous disposition of the Dutch crew; but on this point there is the evidence of one of the Dutch captains, “that the crew were sufficiently well disposed to run the ships on shore, and that they would have done so, had it not been from the appearance of the army.” In this very plea, therefore, the army were materially instrumental, in producing what is stated to have been a chief cause of the surrender.

In regard to precedent, perhaps, there is no case exactly similar to

the present. The case of Commodore Johnson<sup>1</sup> on the same spot some years ago, is perhaps that which comes nearest to it. There, although possession was taken by the fleet, yet an army [ \* 63 ] operating \*by their presence on shore were considered as part of the capturing force, and allowed to share. But if no precedent can be produced, this case can be determined only on the general principle; and the great principle of joint-capture, it is submitted, is simply this,—that those who are present, and contributing to the surrender, although they do not concur in the act of seizure, are yet to be considered as joint-captors. On these grounds it is contended that the army under General Craig are entitled to share in this capture.

#### JUDGMENT.

SIR W. SCOTT. I have now heard the evidence in this case, and an elaborate argument for the army with much attention; and it may perhaps be convenient for me, in this stage to express the impression which the whole of what I have heard has made upon my mind, for the purpose of saving time; as the great pressure of business on the court, makes it extremely desirable, that we should employ as little time as possible on unnecessary discussions. I shall still, however, be ready to hear the counsel for the fleet, and also the reply on the other side, if the gentlemen shall think it necessary; but at present I must say, that no observations that I have heard, nor any considerations which I have been able to give the matter, have in any degree shaken the first impression of my mind on this business.

The question is, Whether such a case has been made out, on the part of the army, as will support their claim to be considered as joint-captors? In the first place, it is not pretended that it is a case which comes within the provisions of the act of parliament,<sup>2</sup>

[ \* 64 ] \*which directs the army to share, in some cases, in conjunction with the fleet. There are, it is well known, several descriptions of such cases, which I need not now advert to, as it is not pretended, that this case comes under any one of them. In the next place, it is not argued, that this is a case of concerted operations. That the army and navy might have similar views is not contested, but whatever was done, was done separately, and without concert or communication. Thirdly, It cannot be denied, that it lies upon the army to make out a case of joint-capture, and to show a coöperation on their part, assisting to produce the surrender; for the sum

<sup>1</sup> The Hoogkarspel, Lords, June 30, 1786.

<sup>2</sup> Prize Act, 33 Geo. III. ch. 16.

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was made to the fleet alone. Possession was taken by the fleet, the army could not take it. Therefore the *onus probandi* lies on them, to prove that there was an actual coöperation on their part; for it is, I think established by decided authority, and particularly in the late case of Jaggernaickporam, before the Lords of Appeal,<sup>1</sup> that much more is necessary than a mere being in sight, to entitle an army to share jointly with the navy, in the capture of an enemy's fleet. The mere presence, or being in sight of different parties of naval force, is, with few exceptions, sufficient to entitle them to be joint-captors; because they are always conceived to have that privity of purpose which may constitute a community of interests. But between land and sea forces, acting independently of each other, and for different purposes, there can be no such privity presumed; and, therefore, to establish a claim of joint-capture between them, there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient. Fourthly, I am strongly inclined to hold, that "when there is no preconcert, it must be not a [ \* 65 ] slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint-capture. Where there is preconcert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him, and whether that is important or not, it is not so material; the part is performed, and that is all that was expected. But where there is no such privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing of a slight aid, insignificant perhaps, and not necessary, that will entitle another party to share. Suppose an engagement at sea, in which a part of the enemy's crews being disposed to fly to shore should be prevented from landing by an armed force, and should therefore be induced to surrender with the main fleet; or suppose this body of armed men on shore should have prevented the fleet from obtaining supplies, two or three days previous to the action, these would be very remote services, and such as would not induce me to pronounce for a joint-capture. The services which I should require, must be such as were directly or materially influencing the capture, so that the capture could not have been made without such assistance, or at least, not certainly, and without great hazard. It is further expected that the claim is supported should be clear and conclusive upon an interest of joint-capture

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to make out their case. The presumption is on the side of [ \* 66 ] the actual captor. Their evidence, therefore, must \* be satisfactory; for if not, or if it is left at all doubtful, it is the duty of the court to adhere to the interests of the actual captor.

These being the principles, let us see what are the facts of the present case, and the amount of the claim grounded upon them. As to preconcert, that has been totally abandoned on the part of the army. That the army did every thing that could be done cannot be made a question; on this point I need say no more than that it was a British army. As far as spirit, and courage, and patriotic and gallant exertions of every kind, could entitle them to be considered as joint captors, their claims would be readily allowed; but this is not the view of the subject which the court is at liberty to take. The question is only, Whether, in the situation in which they were, they did or could do any thing which can entitle them, under the known rules of this court, to be legally considered as joint captors? It seems there was a very general expectation, at the Cape of Good Hope, that a Dutch force would soon arrive in those seas; but, as all preconcert is given up, I do not hold it to be incumbent on me to state every measure that was taken by the naval and military commanders, separately, to reach those parts where it was expected the Dutch fleet would first make its appearance. The only fact alleged on the part of the army, before the arrival of the main body on the 16th, is, that Captain M'Nabb was stationed with a small body of not more than forty men near Saldanah Bay. It is impossible that such a force could do more than act as a party of observation. Against the Dutch fleet, consisting of 2500 men, they could effect no other purpose; and I need only advert to the smallness [ \* 67 ] \* of their number to show that it was impossible that they could even prevent the crews from supplying themselves with water and other provisions from the shore.

It appears in the evidence of one of the Dutch witnesses, "that on his arrival on the anchorage ground, he did not perceive any troops posted on the heights, and that it was not till noon of the 16th of August that they were hindered in their watering parties." With respect to other supplies, it is said that, in one instance, twenty-five head of cattle being brought down to the shore by the country people, the Dutch butchers, who had come on shore to take them off, were obliged by the appearance of some of these troops to leave their work and go on board. This is the only instance in which they appear to have met with any interruption, and on this point what Admiral Lucas says is decisive. He says, "that he was not prevented by any of our posts from watering or communicating with the country."

General Craig's own letter is also strong evidence to the same effect, where he says, "The Dutch fleet were near Schappen Island, watering and setting their rigging, as if they meant to stay some time;" and with regard to the force of the troops, in the same letter he says, "King, with the light infantry, is pretty close to them, but the rest of the troops cannot reach it these four days at least. I think, if you can anchor below them, it may be a bloodless, but not less glorious action." From these representations I think it is pretty clear that there was nothing to interrupt their quiet anchorage in the bay, nor to cut off their communication with the country, except in one or two \*trifling instances. Therefore I can- [\* 68 ] not accede to what has been advanced, that material service had been performed before the 16th of August; prior to that day nothing was done by this party, which did, in the most remote degree, contribute to effect the capture. Indeed, if they had done this service in a much more effectual manner than they had an opportunity of doing, if they had every day prevented the Dutch from watering, as they did in one instance drive them from their supplies of cattle, or if they had been able to prevent them from communicating with the people of the country, I should have found it very difficult to say that such services as these could entitle them to claim as joint captors. Suppose an enemy's fleet to be in the Downs, and that they should be prevented from landing by the garrison of Dover Castle; if they were afterwards compelled to surrender to our fleet, I should not hold the garrison to be in any way entitled to be admitted as joint captors. If that be so, the whole matter is reduced to the 16th of August, and if the services of that day will not be sufficient to sustain their claims, the preparatory services which have been relied on will, I think, not help them. Then what was done on that day? The preponderance of the evidence seems to be with the army in respect to the time of their appearance. It is, I think, proved that they were in sight of the Dutch squadron some few hours before our fleet arrived. But what was done? The watering parties withdrew, and nothing more; they retired unmolested, and the troops had no means of annoying them. Mention is made of a cannonading which took place against a Dutch frigate that was stationed nearer to the shore for the \*purpose of watering. But the nature [\* 69 ] of this attack seems very doubtful. Some witnesses say it did considerable damage, others say very little; some say "the army could have destroyed her," others say "not without throwing shells." I own it appears to me very improbable that it should have been in the power of the army to take or disable her before it would have been fully in her power to sheer off. However that is not material,

as it is admitted the firing ceased, leaving the frigate in the possession of the Dutch, and without having sustained any material injury. No offensive operations took place between the army and the Dutch fleet. It is said indeed in the evidence of Mr. Ferguson, "That as soon as the advanced corps became visible to The Bellona, she cannonaded them, and that one of the shot struck some stands of arms belonging to the corps, and damaged them; that the corps on gaining the heights returned the fire with four light field-pieces, and having brought up a howitzer, several shells were thrown at the vessel; that having another howitzer ready to be got up, it would have been in the power of the said corps to have entirely destroyed the frigate, and that, by marching down to the beach, they might have reached every other ship of the Dutch squadron." But I cannot but look on that as a very doubtful fact, for other witnesses say, "They could not have reached them; as, at any rate, without quitting the bay, they might have taken another station at such a distance as to have been in perfect safety from the army." I cannot, therefore, help thinking, that it must have been a very unfounded persuasion that this

witness has expressed, of the power which the land forces [ \* 70 ] \* could have had of annoying the Dutch fleet, and I do not think it is supported by the general effect of evidence. The whole amount then of the coöperation of the army on the 16th is, that a watering party of the enemy was compelled to withdraw, and that a few shots were exchanged between the advanced corps and a Dutch frigate. This, with the addition of one or two other circumstances which I shall presently advert to, makes the whole amount of the services which are pretended to have been rendered by the army on the 16th of August. In a few hours the English fleet made its appearance; and what was then the situation of the Dutch fleet relative to the two forces separately? With respect to the army, the army could not take them, nor even annoy them. Relatively to the fleet alone, no one can doubt for a moment but that, from the first appearance of the English fleet, the Dutch squadron was an object of certain capture or certain destruction. The utmost of the argument on that side is, that the Dutch might have destroyed their vessels; there was no hope of escape, much less was there any chance of making effectual resistance. An engagement was hopeless in regard to the superiority of the English fleet; and in other respects the crews of the Dutch vessels showed no disposition to fight, being, in every ship, more or less in a state of mutiny, as we learn from Admiral Lucas himself.

But it is said, they might have chosen the destruction of their ships, and that the presence of the army prevented them from resort-

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ing to this expedient, and, therefore, that they are to be considered as joint-captors. It has been allowed that no such case of joint-capture as the present ever occurred before. That alone is an \*unfavorable circumstance, because the court would not be [ \*71 ] disposed to carry this doctrine farther than it has already gone, unless some clear principle could be shown to warrant the extension. The principle of terror to support this claim must be, of terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not say that a case might not, under possible circumstances, arise, in which troops on shore might be allowed to share in a capture made in the first instance by a fleet. I will put this case:— Suppose a fleet should come in to a hostile bay with a design of capturing a hostile fleet lying there, and a fleet of transports should also accidentally arrive with soldiers on board; suppose these soldiers made good their landing, and gained possession of the hostile shore, and by that means should prevent the enemy from running on shore, and from landing, and thereby influenced them to surrender; I will not say that troops in such a situation might not entitle themselves to share, although the surrender had been made actually to the fleet. But suppose the troops to land on a coast not hostile, but on their own coast, I do not apprehend that the possession of such a shore would draw the same consequences after it. For what difference would it make whether there were troops on shore or not? The enemy must know, that in a day or two the landing on a shore to them hostile, must be followed by sure and certain captivity, whether there was a party of military or not. What additional terror does an army hold out? The consequences of captivity would be the same in either case, and unless there had been a notice and denunciation of particular severity, I do \*not understand that by the laws of war [ \*72 ] they would be exposed to more than a rigorous imprisonment. Then, what is the difference between the case which I have just stated, and the present case? It is said that the country was disaffected towards the British, being but a recent conquest; but it appears to me that the affections of the Dutch were of a very mixed nature. The crews of the Dutch ships were mutinous from their attachment to the English, and swore "They would blow out the brains of any one who should fire on the English;" and with respect to the people of the coast, it by no means appears that they were unanimous in their disaffection. It is no proof, that because they supplied the Dutch fleet with provisions they were adverse to the British. We know that Lord St. Vincent has in this war been supplied with fresh provisions from the Spanish coasts; and it is well

known in history, that when Louis the Fourteenth was marching against Holland, he was supplied with provisions by Dutch merchants, not from enmity or disaffection to their own country, but from the mere natural affection for gain. No stress, therefore, can be laid on that circumstance, and it appears certain to me, that if the Dutch had attempted to destroy their ships, and to effect a landing on shore, they must in a few days have been hunted down, and have become, in the ordinary course of things, prisoners of war. The appearance of a military force, therefore, in my opinion, made no difference; it conveyed no additional terror, or at least no such special intimidation, as could entitle them to be considered as joint-captors. This is

my view of the case, supposing there had been no special [ \* 73 ] denunciation that a severe military execution would \* be exercised upon them if they ran their ships on shore. But it is argued, that such a denunciation did take place, with a view to bring them to a surrender; that it did produce that effect, and that without such an intimation they would have persisted to run their ships on shore. There is a great deal of evidence on this point. There is a great deal to prove that they could not have run their ships on shore where the army was stationed, but that they could have run them on shore at another place; there is, however, much evidence that the English fleet could have prevented them at that spot; and there is also much evidence that the Dutch crews would not have consented to such a measure.

I need not enter into a minute detail of this evidence, as I think I do not state it too strongly when I say that the fact is at least questionable, and remains at least a matter of doubt, whether this measure could have taken place or not. It is in itself highly improbable that they should wish to encounter the danger and difficulty of running on shore on an unfriendly coast, and it is not pretended that they had come to any decisive resolution on the subject. It is spoken of as being a matter of deliberation amongst them, and they are rightly described as being in a state of perplexity and distress. Some speak of it as a thing judged proper to be done in a council of war; but all agree that it was to be discussed again, and that they had not come to any final determination on the measure. When the English fleet came in sight, it appears, that Admiral Elphinstone sent to summon them to surrender. A verbal answer was returned. Admi-

[ \* 74 ] ral \* Elphinstone sent a second summons, and demanded an answer in writing. A council of war was held, and the result was, (for they decline stating particularly what passed at the consultation,) that they proposed terms of surrender. I think the evidence is, that they were strongly inclined at that time to come to



a surrender. But it is said, that they did not expect the terms would be acceded to, but sent them only with a view of gaining time. The evidence of Admiral Lucas's captain is to the following effect: he states, "That if the army had not been present on the shore, Admiral Lucas would not, in his opinion, have engaged the British fleet, owing to the mutinous behavior of a great part of the Dutch crews; but notwithstanding there were enough to be depended upon to run the ships on shore and burn them, as it was the admiral's intention to do, if he had not received a letter from General Craig, informing him if he attempted so rash a measure no quarter would be given by the troops to any individual that should land. That on the appearance of the British fleet, Admiral Elphinstone sent to summon them to surrender; that a verbal answer was returned by Admiral Lucas, that he should call a council of war that night, and would send the result of their consultation to Admiral Elphinstone the next morning; that in about three hours afterwards, another letter was brought from Admiral Elphinstone requiring an answer in writing, and a promise that no damage should be done to the ships during the night; that such promise was accordingly sent by Admiral Lucas; that the consultation took place during the night, and at ten o'clock on the next morning, the 17th of August, proposals of capitulation were sent;" \*and then he states, [ \*75 ] "That these were sent only to gain time."

Now they had passed their word of honor that no damage should be done during the night, and Admiral Lucas says, "That having given his word, he considered himself bound to do no injury to the ships during the night." I cannot help thinking, therefore, that if the gentlemen had ever thought of running their ships on shore, they must very soon have abandoned it; because, that they should bind themselves not to do it that night when it would be most easy, and resort to it afterwards, is not very likely. Besides, I do not see that their proposals were rejected except on one article. An alteration was proposed by Admiral Elphinstone, "That instead of a Dutch frigate other proper vessels should be appointed to carry the Dutch officers to Europe;" and this alteration was immediately acceded to on their part.

The only circumstance that could make any difference in respect to the claims of the army between the time of the proposal and the time of the capitulation is, "That General Craig's letter is said to have been brought whilst they were under deliberation." It is rather difficult I think to conceive how this message could have been conveyed. It is said by a watering boat; but there seems to be no small difficulty to understand how the knowledge of this matter

came afterwards to General Craig. However, with respect to the arrival of the letter, there is a very material difference in the evidence, and the exact point is left very disputable; one of the witnesses says that he cannot say whether it came before or after the decision.

[ \* 76 ] \* Now under this evidence, and looking at all the facts together — considering the great doubt which exists, whether such a resolution was ever made, or could have been executed — recollecting that the account of the Dutch officers is in some measure a vindication of their own conduct, (although I do not see that any apology was necessary,) and conceiving that under their feelings as gentlemen for the misfortunes of their country, they may have expressed their sense of their obligation to destroy their vessels, — perhaps rather more highly than could be justified by the fact, — I cannot say that it is proved to me that the measure was resolved upon; or if resolved on, could have been executed; or if actually resorted to, that it could not have been executed without incurring any immediate danger from the army.

Under these circumstances, I am of opinion that the claim of the army is not supported on any principle, on which either this court or the Court of Appeal has pronounced for an interest of joint-capture. Even allowing the denunciation to have been made; if such principle of intimidation would be sufficient, how could I say that a crowd of the inhabitants of the coast would not be entitled also if they had threatened, as they would probably do, to knock those on the head who attempted to escape on shore after destroying the ships.

As to the former case of The Saldanah Bay, which has been cited, it is materially distinguishable from the present case by this circumstance, that there the fleet was close on its own shore, and the soldiers were landed from the fleet upon a hostile coast. There was pre-

[ \* 77 ] concert and coöperation of the most effectual kind, and, therefore, it is not applicable to this case. These are the impressions which this case has made on my mind. I shall be very glad to hear any additional observations from the counsel for the army, if they have any thing farther to offer; but I have paid great attention to the evidence and to the arguments which I have heard, and I confess the impression of mind, as I have stated it, is strong and decisive, that the claim of the army in this case cannot be sustained.

## THE WALSHINGHAM PACKET, Bell, master.

July 10, 1799.

Trading on board a British packet illegal. Effect of that illegality in the Prize Court to bar the claimant.<sup>1</sup>

THIS was a case of a British packet, retaken from the enemy, in which a claim was given for the cargo as the property of British and Portuguese merchants, and resisted on the part of the captors on the ground of the illegality of such a trade under the statute 13 & 14, ch. 2, cap. 11, § 22.

For the captors, the *King's Advocate* and *Laurence*. There is no dispute about the facts in this case, as it is allowed that the ship was a British packet, taken with a large quantity of merchandise on board. On our part it may be admitted, for argument, that these goods are British property, or belonging to Portuguese subjects, as suggested in the claim. That they are described as private adventures can make no difference. The quantity of these goods but ill accords with the ordinary extent of such interests; but were \*it in point of fact true, all traffic on board these vessels is [ \*78 ] equally prohibited. The statute 13 & 14, ch. 2, cap. 11, § 22, enacts, "that no ship, vessel, or boat, appointed and employed ordinarily for the carriage of letters and packets, shall, unless it be in such cases as shall be allowed by the said person or persons which are or shall be appointed to manage his Majesty's customs, or officers aforesaid, import or export any goods or merchandise into or out of, the parts beyond the seas, upon the penalty of the forfeiture of 100*l.* to be paid by the master of the said vessel or boat, with the loss of his place; and all goods and merchandise that shall be found on board any such ship, vessel, or boat, shall be forfeited and lost." The policy of this regulation is, at first sight, obviously, to prevent vessels engaged in this important public service from being encumbered with cargoes, which must retard their sailing, and make them a more easy prey to cruisers; and at the same time excite a greater vigilance in the enemy to intercept them. It is a trade, therefore, expressly declared illegal by act of parliament; and although it is not

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<sup>1</sup> [The *Cornelis and Maria*, 5 C. Rob. 28; The *Recovery*, 6 C. Rob. 341; The *Rover*, 2 Gall. 240, 242; The *Rapid*, 8 Cranch, 155; The *Venus*, 8 Cr. 258.]

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The Walsingham Packet. 2 C. Rob.

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specified who shall be entitled to the penalty, and although it may be supposed therefore to be reserved to the king, it is not material in this case, as the way in which the act must operate on this claim is, by making the whole transaction illegal, to disable any persons from appearing in a court of justice to maintain a title to property taken in such an illegal traffic. The recaptors stand indisputably before the court as *bonæ fidei* possessors of this cargo, having taken it out of the hands of the enemy. And, till any persons can show

[ \* 79 ] a legal title to demand it from them, they are entitled \* to the full benefit of the capture. As it has been already determined before the Lords in the case of *The Eliza, Worsely*,<sup>1</sup> in which a claim of a British subject for property taken in a trade carried on in violation of the charter of the East India Company was rejected, and the property condemned to the captor.

The Court suggesting, that in a question of this nature it would be proper that some appearance should be given for the crown, —

The *King's Proctor* appeared, and prayed, That the question of law, as to the interest in the penalty, might be reserved.

For the claim, the *Advocate of the Admiralty* and *Sewell*; for other parties, *Arnold* and *Croke*. The act of parliament, which has been relied on, does not apply to the circumstances of the present case. If the whole act is considered together, it will appear that the chief object of the legislature was to prevent frauds and abuses in the customs, as the act is particularly entitled; and with that view it was thought necessary to put certain restrictions on the trade carried on by ships of war, and in the present clause, by packets. But this is done only in a special manner; not by declaring it to be an illegal trade, and a trade in all cases necessarily incurring the penalty of the law, but by subjecting it to the control of the officers of the customs, and by enacting, directly in opposition to the present seizure, in the 15th section, "That no seizure should be made but by the person or persons who are or shall be appointed by his Majesty to manage his customs, or officers of his Majesty's customs for the time being, or such other person or persons as shall be de-

[ \* 80 ] puted and authorized \*thereunto by warrant from the lord treasurer or under treasurer, or by special commission from his Majesty under the great or privy seal; and if any seizure shall hereafter be made by any other person or persons whatsoever, for

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<sup>1</sup> Admiralty, Feb. 6, 1794. Lords, July 18, 1798.

any the causes aforesaid, such seizure shall be void and of none effect, any statute, law, act, or provision to the contrary in anywise notwithstanding." Suppose a seizure had been made, then, in this case, by any person not competent to seize, and the matter had been brought forward in the way of an information; would it not have been a sufficient plea to have shown that the seizor had not a *persona standi in judicio*? It must evidently be so; for no proceedings can be instituted, but under the act; and, therefore, it is, in the first instance, necessary to be shown that the proceedings are according to the directions of the act. The case of a seizure by prize is very different from the seizure directed by the act; and when it is recollected how strong and general the terms are, "that a seizure by any other persons whatever shall be void and of none effect, any statute, act, or provision to the contrary notwithstanding," it cannot be doubted that this seizure is one of those expressly discouraged by the act. The object of the act was to harass trade as little as possible, in the way of general informations, but to submit the expediency or in expediency of allowing this particular mode of trade, to the officers of the customs. In the present case it may reasonably be contended that the trade has passed under their inspection, and received their permission and tacit assent at least, although no express license can be produced. The goods in question were all taken from the quay, and all entered at the custom-house for export- [ \* 81 ] ation; and the very notoriety of the shipment of such a cargo at a place like Falmouth, where it could not be overlooked, is sufficient to entitle the claimants to say, that as far as the consent of the officers of the custom-house can protect them, they are protected.

[The Court asked, Whether the goods were entered for exportation on board a packet? No answer being returned, the Court asked, Whether it was contended that the subordinate custom-house officers were empowered to give this consent, supposing that the circumstances of notoriety were sufficient to raise a presumption of knowledge of the fact in them?]

It was said that "the persons aforesaid," mentioned in the 22d clause, as being empowered to grant the allowance, were in fair construction the same persons as those mentioned in the 15th clause, to whom the right of seizure was confined.

In reply, the *King's Advocate* contended, that no tacit assent or connivance could be pleaded to dispense with the regulations of an act of parliament; that whatever might be the circumstances of notoriety under the view of officers on the quay at Falmouth, they were not the persons in whom the power of giving allowance was

lodged; that "the person or persons aforesaid," in the 21st clause, referred to those named in the very next preceding clause, in which the case of goods landed by permission was provided for, and the words of which were, "That all foreign goods and merchandise, which, by the person or persons which are or shall be appointed by his Majesty for the managing the customs, and the customer, [ \* 82 ] collector, and comptroller, shall be permitted, &c. &c." — "evidently reserving so important a discretion in the hands of those superior officers; and that the permission alluded to in the 22d clause, could only refer to the direct allowance under the authority of these officers.

## JUDGMENT.

SIR W. SCOTT. This is a case, as it has been truly observed, of a very different complexion from those which generally occupy the attention of this court. It turns upon a principle which the Court of Appeals has sanctioned, in respect to the power of a court of this nature, to take cognizance indirectly of breaches of the municipal law of this country. This court is properly and directly a court of the law of nations, and I am not aware that any case had occurred before the present war, in which the court had acted on the principle on which it certainly did act in the case alluded to; I mean the case of *The Eliza*. It was the case of a ship and cargo, in which the claimant, being a British subject, appeared to have been engaged in trafficking with that cargo in direct violation of British acts of parliament. It occurred to those who were entrusted with the concerns of the captor, that a resistance to such a claim might be sustained, upon a ground which had not been occupied in any other case that had occurred, viz.: That although this court is properly and directly a court of the law of nations only, and not intended to carry into effect the municipal laws of this or any other country, and although it was in the habit of declining to take notice of the private laws of other countries, yet it was an inquiry worth pursuing, Whether a [ \* 83 ] British Court of Admiralty, sitting \*here, armed with its power from this country, and carrying all its process into effect by the authority of the British parliament, was not so far a British court as to be bound to take notice of British acts of parliament, and the flagrant breach of our municipal laws, with respect to the transactions of our own subjects coming incidentally before it. In that case, the Court of Admiralty did not sustain the objection to the extent in which I have now stated it. My predecessor condemned the cargo, but generally as French property. The cause went up to the superior court, where it was most elaborately argued; perhaps no

case ever underwent a fuller discussion. There, the principle was affirmed and established, that a British Court of Admiralty was bound to take notice of a violation of an act of parliament, appearing on the face of the claim, and that a British claimant could not entitle himself in such a court, to a restitution of that property, happening to fall by accident into the hands of a British captor, which, by his own showing, appeared to have been employed in an illegal trade.

That this decision has removed all difficulties on this question I will not assert. It is a good moral and legal principle unquestionably, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to persons setting up a violation of law, on the face of his claim. It is a sound maxim, to which the courts of the law of the land have always attended; and whether the penalty is great or small, or whether there be no penalty at all, yet, if the act is reprobated, a man will not be allowed to claim a right founded on it. But cases had not occurred \*in which [ \* 84 ] the Court of Admiralty had met with occasion to apply such a principle, except in cases of British property taken in a trade with the king's enemies; but in such cases the exception is not to be considered as arising from municipal law, but from the principle of allegiance, which is a general principle of the law of nations. It was in the case of *The Eliza*, that it was first decided, that the Court of Admiralty was bound to take notice of an illegal practice, evidently appearing in the conduct of a British subject, though the illegality arose from a violation of some law merely municipal; and that it was bound to reject the claim of any British subject, whose property had found its way into the hands of a British captor, if the transaction in which that property had been employed was a transaction contrary to British law. The question is still not relieved from all its difficulties, and the observations which have been made to-day, only revive the objections which were made before. It was said, (and cannot be denied,) that such a practice might carry the interest in a very different course from what the act of parliament, which had been violated, directs. In *The Eliza*, which was a case of traffic illegally carried on in violation of the charter of the East India Company, the interest has gone to the private captor, whilst the penalty by the act of parliament is given to the company as a compensation for the damages arising to them from such illegal trade. In *The Enterprize*, the course has been the same; but in *The Etrusco*,<sup>1</sup> a later case, it has been questioned, whether those decisions were right as to the conveyance of

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<sup>1</sup> Lords, November 26, 1796.

the forfeiture, and whether the penalty should not go to the  
 [ \* 85 ] king, as the person injured \*by every violation of the law,  
 where no specific appropriation of the property was directed.  
 And this question still remains subject to further deliberation; on  
 that part of the case, therefore, I shall not think of deciding till that  
 question is disposed of.

As to the facts of this case they are pretty clear. The vessel is a  
 British packet, and by the statute 13 & 14, ch. 2, c. 11, s. 22, the  
 carrying of all merchandise on board a packet is prohibited, except  
 under special allowance there described. The amount of the articles  
 is immaterial, except in a very minute degree, which the revenue laws  
 themselves have specified; the quality also is altogether immaterial.  
 Neither does it make any difference whether the owners are on board  
 or not, or whether the lading is called a cargo or a private adventure;  
 the prohibition is general, against the carrying any merchandise.  
 With the policy of the act I have nothing to do, as the law has  
 determined it; but the reasons pointed out by the King's Advocate  
 are obvious, that a cargo must be a hinderance and obstruction to  
 despatch and expedition; and if it is said, the crew would defend  
 themselves, and fight the better for a cargo, it is to be remembered at  
 the same time, that it holds out a greater lure to the enemy. These  
 goods are admitted to have been put on board for Lisbon for the  
 purposes of trade, and the only question is, Whether they come under  
 the allowance of the act of parliament? The exception is, " Unless  
 it be in such cases as shall be allowed by the said person or persons  
 which are or shall be appointed to manage his Majesty's customs or  
 officers aforesaid." Then who are the persons invested with  
 [ \* 86 ] this discretion? I think, by fair construction of the \*act,  
 they must be those mentioned in the clause immediately  
 preceding, in the 21st section, the collector and the comptroller of the  
 customs; on any other explanation, every tide-waiter would be com-  
 petent to grant this indulgence, which is an interpretation the court  
 would not willingly admit, unless absolutely forced upon it. In the  
 next place, What sort of allowance would be held sufficient? It has  
 been argued that a tacit permission would be sufficient, that it would  
 be enough if a practice had grown up by connivance; but I cannot  
 accede to that argument, nor can I consider that to be the permission  
 which the statute recognizes; it must be a full, distinct allowance,  
 and expressed in such a manner as to be capable of proof. If it were  
 proved to have been practised in twenty instances, it would avail  
 nothing; it would only show that the due vigilance had been laid  
 asleep; but it could amount to nothing as a legal dispensation, nor  
 be considered as any legal allowance which the court can receive.



Then how stand the facts? The claimants appear before the court as persons trading contrary to law. It is said, there can be no seizure but by the custom-house officer. I admit it; but this is not a case of seizure. It is said, that no forfeiture can attach but in a particular manner directed by the statute; and it is true. But this is not a forfeiture, although to the parties it has certainly much the same effect. The question is, What will be the effect in a Court of Prize? Whether a party can be admitted in this court to say, "True it is, I have been engaged in an illegal trade, but the property is mine, give it me, and let me go?" It has been decided by the superior court, that he shall not. In the Exchequer, the \*seizing officer is [ \* 87 ] put to make out his case; but here it is different, the claimant must support his title, and if the Court of Appeal has determined that such a person is stopped *in limine*, it matters not to him what becomes of the property; he can have no right to moot difficulties in this court, as to the final disposition of it. Looking on the decisions of the Lords on this point, as undisturbed decisions, I must apply the principle to this case, which I am of opinion, comes fairly within it. But as I am aware of the doubts which have arisen on the judgment of the Lords of Appeal in the case of *The Etrusco*, and as I know that court feels it to be a question of weight, I shall direct this case to stand over as to that point, to await their final decision. A mistake has run through the whole of this argument. The gentlemen have argued to bind me down to this particular act, and then the difficulties arising from it are pointed out; but that is not the state of the case. The question is, Whether I am to apply the general principle? The act of parliament is used only as a medium of proof, to show that what has been done is illegal, and then the principle applies, as a great moral and legal principle, adopted to a very great extent in the jurisprudence of this country, and particularly sanctioned and introduced into the practice of this court, by those decisions to which I have alluded.

Claim rejected. Question reserved, to whom the property is to be condemned?

[ \*88 ] THE KINDERS KINDER, Haysen, master.

July 11, 1799.

Claim admitted on behalf of the Danish government for Algerine property taken under the Danish flag, the Dey having exacted payment from the Danish consul.<sup>1</sup>

THIS was a case of a claim given on the part of the Danish College of Commerce, praying to be admitted in the place of Algerine subjects, whose property had been captured on board a Danish ship, and for which the Dey of Algiers had exacted immediate compensation from the Danish consul.

JUDGMENT.

SIR W. SCOTT. This is a very singular case, in which the court has certainly considerable difficulties to encounter, and one in which it may perhaps be impossible to decide in any way that may not be liable to some fair objection. However, the court must find its way as well as it can, and can hardly undertake to do more than to give what the law terms a *rusticum judicium*, or a coarse sort of equitable arbitration. It is certainly the duty of captors, in all cases, to carry their prizes to places where they can be put into a course of legal inquiry; but in captures made on the property of Oriental subjects, a more than ordinary caution, and regularity of proceeding should be observed, because it is very much the practice of those countries, under a law of nations now peculiar to themselves, to resort immediately to a very summary justice, and to redress themselves for what they consider as an unjust capture, by demanding compensation from the countrymen of the aggressors. British subjects resident amongst them may be exposed to very alarming difficulties

[ \*89 ] and danger for acts of other persons, if those acts are not guarded with the most scrupulous care.

At the time when this capture was made, the king's naval officers in the Mediterranean station were acting in a very critical situation of affairs. The exigencies of the moment are the best excuse for what was done, or neglected to be done, irregularly in these proceedings. The cargo consisted of corn, sugar, and cotton, laden at Algiers on board a Danish ship, and destined ostensibly to Leghorn, but, according to a second charter-party, and, as I think, really to

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<sup>1</sup> [See *The Fortune*, 2 C. Rob. 92.]

Marseilles. Immediately on hearing of the capture, the Dey of Algiers sent for the Danish consul, and with an emphasis which the Danish consul did not perhaps think it prudent to resist, demanded of him to refund the value of the cargo taken on board the Danish ship; alleging that the Danish flag ought to have protected the cargo, and that if it did not, the Danish government and its public agents, were answerable. The Danish agent paid the money under this demand, and on a representation of all the circumstances to the Danish government, they reimbursed him, and the application now made is, that the Danish government may be permitted to claim in the place of the original proprietors.

All civilized governments have a common interest in paying great attention to each other in their proceedings with the Barbary states. And the court would certainly be very glad to have it in its power, to aid substantial justice in the dealings of all European subjects with them. At the same time it must be understood, that if subjects of a neutral country submit to any flagrant act of violence, as for instance, if the \*Dey of Algiers should step forward to claim [ \* 90 ] a cargo, evidently French, and they submit to refund the value of the property, I should certainly not permit their acquiescence to defeat the right which a British captor had gained in such a cargo. But in a doubtful case, the court would incline to support an act done for the prevention of mischief, and although the transaction might not be strictly correct, if it appeared to have a solid foundation of justice at the bottom, the court would be strongly inclined to uphold it in its full extent.

With respect to the evidence in this case, the papers have been twice translated: first from Arabic into Italian, and then from Italian into English. What sort of a transit they have had into Italian I cannot say, being not acquainted with their original language, the Arabic. But to be sure the court could not have had a worse medium of information than these English translations. From the many inaccuracies which are obvious, I am convinced that, were they to be closely examined, they would be found to contain no representation at all of the Italian letters.

On reading the different letters, however, I am strongly impressed with an opinion, that the Dey, in speaking of the property as his own, spoke as sovereigns are apt to speak, connecting the interests of their subjects with their own. The letters strongly point to an interest in this cargo as being not in the Dey, but in some Algerine merchants, his subjects; and I understand him, therefore, as interposing rather to protect the interest of his subjects, than to assert any private interests of his own. But if it is so, it would be too much to say

[ \*91 ] that, because the real proprietors \*applied to their own government in the first instance instead of applying here, they should therefore forfeit that redress, which they might have had by pursuing it here originally in the regular mode. The Americans, we know, did the same ; they applied to their government, and desired their claims to be put in adjustment between the two countries. The Dey has his mode of adjustment, but it would be hard that, therefore, his subjects should forfeit the redress, which they might have received here in the first instance if they had proceeded in the regular manner. They have had compensation, it is true, by means of the Dey's requisition made upon the Danes. But if this has been done to prevent innocent subjects of Denmark from suffering, I think that the court is bound to give the Danes the benefit of all the equity that could have belonged to the Algerine claims, if they had been brought forward. The captors suffer nothing by this measure, for they could have no right to detain what belonged to Algerines, and if the Algerines have received payment from the Danes, still that can convey no interest to the British captors. Under these considerations I shall not call for particular claims to be given for the private proprietors of the property, claimed generally as the Dey's own, but I will endeavor to assign, as well as I can, *crassiore telâ*, in a coarse kind of way, what appears upon the evidence to be the respective interests of the different individuals, and shall restore or condemn as those individuals would have been entitled, if they had stood before the court.

Mr. Busnah, I think, appears to be interested to a considerable amount, in one third of the cotton \*clearly ; that I shall restore to him as an inhabitant of Algiers. He seems also to have been a proprietor of one third of the two thousand and sixty-nine measures of corn, and also a part owner of that laden at Teideles ; for I think from the manifest that quantity must have been on board this vessel. I restore, therefore, a third of these parcels.

There is next a parcel mentioned in the letter as being for our account. The question is, Who are the individuals composing this firm ? J. Bacri, the broker, resident at Algiers, must clearly be one, and I think his brother, resident at Leghorn, must be another. I shall restore their shares.

Another share, must, I think, belong to a person, another brother, resident at Marseilles ; the letters, in the whole tenor and style of them, point to such an interest. His share I shall condemn, the rest I restore, and direct it to be paid to the Danish government. I am sorry that the Danish government should suffer any loss in this affair,

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*The Fortune.* 2 C. Rob.

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but I have the satisfaction of thinking that it is not owing to the injustice of this country ; it is an inconvenience to which all European states are liable in transactions of this nature where the Barbary states happen to become parties.

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THE FORTUNE, SMITH, master.<sup>1</sup>

April 7, 1800.

Claim on behalf of the American government for Algerine property not admitted, owing to the manner in which the American flag had been assumed.

THIS was a case of a claim given on the part of the American government, praying to be received to stand in the place of African merchants ; in respect \*to a ship and cargo, taken [ \* 93 ] 5th January, 1797, on a voyage from Bona to Marseilles, sailing under American colors, and for which the Dey of Algiers had forcibly exacted compensation from the American consul.

JUDGMENT.

SIR W. SCOTT. This is a case of a ship and cargo claimed on behalf of the government of the United States, and of Messrs. Busnah and Bacri, Algerine merchants, subjects of the Dey of Algiers. The affidavit of claim represents, " That in the month of July, 1796, Joel Barlow, Esq., the American consul at Algiers, having procured the liberation of the American prisoners then in confinement at Algiers, (the state of the plague at that time rendering it dangerous for them to remain longer in that place,) he was desirous of conveying them to Marseilles, but that there was no vessel on which they could embark, except the ship *Fortune*, which then belonged, as this deponent is informed and believes, to Messrs. Michael Busnah and Joseph Coen Bacri, Algerine merchants and subjects. And that the Algerines being at war with Genoa and Tuscany, it was thought inconvenient for the American passengers that the vessel should sail under the Algerine flag. That the aforesaid American consul therefore, to

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<sup>1</sup> This case is here reported without regard to the date, on account of its connection with the preceding case.

prevent an interruption by capture of his humane purpose, took a bill of sale for the ship in his own name, and gave her the American flag, and appointed — Calder to the command, directing him to destroy the said bill of sale when he had reached his port of destination ; and

this deponent saith, that he is informed and believes that the [ \* 94 ] said ship arrived safe with the aforementioned Americans \* at Marseilles, still continuing to be the sole and entire property of the said Messrs. Busnah and Bacri, and that Michael Smith, an American citizen, there took upon himself the command of the said ship under the directions of the said owners, and set sail with her, namely, on or about the 17th November, 1796, in ballast, bound to Bona on the coast of Barbary, where the ship arrived in or about the month of January, 1797, and was immediately laden with a cargo of wheat, to be delivered at Marseilles, though specified in the bills of lading as destined for Genoa. That the said cargo was shipped by Michael Busnah aforesaid, for account and risk of the said shipper, and of his partner, the aforesaid Joseph Coen Bacri, Algerine merchants and subjects as aforesaid. And this deponent further saith, that he hath been informed and believes that the said ship was proceeding on her said voyage, when, on the 5th of February following, she was captured and seized as prize. That the Dey of Algiers, upon receiving information of such capture, caused a demand of indemnification to be made upon the aforementioned Joel Barlow, the American consul at Algiers, upon the ground that the cargo had been put on board a vessel sailing under the American flag, and which the American government, and not the Dey, was bound to support. And that to prevent any dispute or misunderstanding with the said Dey, the said American consul thereupon drew bills upon the American agent for forty thousand three hundred and eighty-seven and two-thirds dollars, the sum demanded as the value of the ship and cargo to be paid within six months in Algiers, and if not then paid, giving the Dey a right to draw at three months sight on the

American government, payable in Philadelphia. And he [ \* 95 ] also saith that, from the circumstances hereinbefore \* stated, he is advised and believes that the American government or the said Messrs. Busnah and Bacri, the said owners of the said ship and cargo, will be the only losers by sentence of condemnation of the said ship and cargo."

The American government, therefore, comes in not as proprietors, but as persons finally concerned in the property, on whom the loss will fall if condemnation takes place. The case has been compared in all its circumstances to *The Kinders Kinder*, in which a claim was admitted on the part of the Danish government, and in which the

court did find its way in a coarse sort of manner, to what it considered to be the substantial justice of the case; to restore those parts which appeared to be the property of Algerine subjects, and to condemn those parts in which there appeared to have been French interests; but, I cannot but think, that the two governments here stand on very different grounds. In that case the ship was an undoubted Danish vessel, there was no question on that point; but the Dey had set up his principle of the law of nations, "that the national flag was to give security to all the property on board," and he had acted on that notion, so far as to exact from the Danish consul a compensation for all the property, on board the vessel which was claimed by his subjects. The Danish government not choosing to contest the right, and finding it to be for their convenience, as any other European government would, paid the money; and if this was a case resembling that, or if the reason for wearing the American flag in this case, could be satisfactorily made out, as it is stated, this court would hold itself bound to go the same length, and give the same

\*aid, that it gave the Danish government in the former [ \*96 ] instance; but it is admitted here, that it was not an American vessel, but a vessel that had assumed the American flag, in the first instance, for the laudable purpose of giving more effectual security to the transporting some American subjects from slavery, and if she had been taken in that employment, I should have held her well entitled to all the protection that could be given to her. But the present is no such voyage. As soon as that office was discharged, the American character ought to have been discarded. To continue the national flag afterwards, for views of private interest, was, I think, in a considerable degree reprehensible. Were those who represent the American government privy to this? I cannot but think that the paper No. 2, which is a letter written by Mr. Barlow to Captain Smith, does strongly indicate an intention of navigating this ship as an American vessel, though having no connection with America. "The Jews who own the ship wish you to take the command of the vessel after the Americans leave her; I wish you to keep this a secret for the present." Was he to take her as an Algerine vessel? The fact has proved that she was to be navigated as an American. There is a bill of sale from J. Bacri, describing himself to act by order of Mr. Barlow. "J. Bacri, (acting by order, and for account of Mr. J. Barlow,) has sold and ceded to Captain Smith, the interest in this vessel, for Mr. Donaldson." Is the court to suppose, that the name of Barlow was used on this occasion without his knowledge? That, I think, is highly improbable. There occurs besides, the name of another agent of the American government in this \*mat- [ \*97 ]

ter, that of Mr. Cathaban, the American consul at Marseilles. The bill of sale is signed by him, and certified and attested by him jointly with the master, they both describing the ship as an American vessel. Can the court suppose that he was ignorant of the real property, and of the transaction in Barbary? Here is a vessel coming on a public service to Marseilles, in a singular character, with American prisoners, and dressed up in American colors by the consul at Algiers. Am I to suppose that all this could have been done unknown to the American consul at Marseilles? I cannot but think that Mr. Cathaban must have known that the vessel was not the property of Donaldson, but of Busnah and Bacri, and that whatever might be the motive of the misrepresentation, the two agents intrusted with the powers of the American government, in those parts, could be no strangers to the fact. Now whether it was done fraudulently against this country, with a view of perplexing the inquiry of our cruisers, or of this court, I think it is not very material; if it was done against the Swedes or Danes, it was still a voluntary interposition of these public characters, to disguise this ship and make her appear what she was not; and supposing it to be done without any fraudulent design, there is still that which ought not to appear, more especially from public persons, an attempt to misrepresent the national character of the vessel; the inconvenience of such a conduct will appear from what followed. The consequence has been, that on the capture of this vessel the Dey falls back on the American government, and demands an indemnification for the property of his subjects taken under the protection

[ \* 98 ] of an American flag. How came she to be sailing \* under that flag? Did it belong to her? Certainly not, it was assumed under the direction of the American consuls, and I cannot but think that the American government would not, in strict justice, be bound to indemnify their agents acting in this business, not only in a manner which their instructions did not authorize, but also in a manner which, if strictly considered, was inconsistent with the duties of the public functions which they were intrusted to exercise. If they are disposed to indemnify them it is an act of liberality to which no person can object. They may be useful servants of the American government, they may have merits in other parts of their public conduct very proper to be remembered by their government, and to entitle them to its protection, even where they had committed a mistake or an indiscretion, but considerations of liberality of that kind will not found a demand against third parties. In this respect then, I think, the Danish and the American governments stand on very different grounds. In the Danish case there was no question of the property of the ship, no Danish agent had interposed irregularly, but in this



case we have two American consuls interposing in this irregular manner to give a colorable appearance and character to this vessel. This is not an American ship at all, it is a ship of another country, and has no pretension to an American character. The result will be, that I am to consider this case as if the American government had not appeared in it, and to look to what the proofs are, as between the British captor and the Algerine, without any mixture of tenderness for American interests, which I should certainly have felt it my duty equally to respect, if, in truth, such interest had been involved in this case, \*on the same footing on which Danish [ \* 99 ] interests had been introduced into the other.

Considering this case as merely between the British captors and Algerine claimants, I do not, at the same time, mean to apply to such claimants the exact rigor of the law of nations, as understood and practised amongst the civilized states of Europe. It would be to try them by a law not familiar to any law or practice of theirs; and, therefore, though the ship appears to have been a prize taken from the British by the Spaniards, yet, having been transferred to these subjects of Barbary, I should not be anxious to inquire whether she had ever been regularly carried into a Spanish port, though the fact, I think, does sufficiently appear that she had been in such a port. Neither should I press to the uttermost extent, in this case, that other principle, (though in itself most rational,) that where a person has been detected in a fraud in the particular transaction, he shall not be admitted to the benefit of a further proof; for we must pay some attention to the rules of morality and law that prevail amongst such people.

As to the evidence of the property of the ship, it is not clearly proved to whom it belongs; but, collecting it as well as I am able, I should say that the strongest presumption is, that it belongs to Jacob Bacri, of Marscilles. For although the papers are full of contradictions as to the national character, as to the destination, and also as to the property, yet I think the greater number do point to him as the proprietor of this vessel. As to the cargo, it is not so strong; perhaps the preponderance of agency and management relative to it lies on the side of persons in Algiers. But still there is great doubt to whom the property belongs, — the papers being full of \*contradictions also on that point. The question is, then, [ \* 100 ] shall the court, being willing to relax its rules in some degree, so far relax them as to admit farther proof? No one can doubt that, if it was an European case, it could not be allowed. Looking at the series of falsehoods, at the false property, false destination, and false description of the national character, the court

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The Rebecca. 2 C. Rob.

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would say, "You shall not be let in to give farther proof." But supposing that I was inclined to relax the rule, have I any prospect of obtaining satisfaction from farther proof? Can any person concerned for the claimant say, that I have any chance of obtaining from Algiers a true distinction of the actual interests? I see little prospect of it. The Algerines have already got their money, and I have no reason to suppose that they would trouble themselves about the matter; but if they did, can I be so sanguine as to hope that there would be a fair disclosure? In the other Danish case the property could, in some degree, be distinguished by the papers before the court; in this case it is admitted that it cannot. This being the state of things, I am at a loss to see what satisfaction could be derived, if I was disposed to allow such an extraordinary indulgence. Being of this opinion, and not thinking that there is any privilege due on account of the American flag so irregularly employed, I find myself under the necessity of determining on the present evidence. That is allowed to be not so sufficient as that I can restore upon it; the consequence is, that I must pronounce this ship and cargo subject to condemnation.<sup>1</sup>



[\* 101]

\* THE REBECCA, Moore, master.

July 12, 1799.

Freight refused between the colonies and mother country of the enemy.<sup>2</sup>

THIS was a case of an American ship, taken on a voyage from Surinam to Amsterdam, (22d April, 1796,) with a cargo of colonial produce. The ship had been restored by consent, reserving the question of freight and expenses. Some parts of the cargo had been condemned, as unclaimed, 19th June, 1798; farther proof was directed to be made of other parts, claimed for American citizens. On motion for an allowance of freight to the neutral ship:—

COURT. Certainly not. I shall in no case of this sort, of direct

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<sup>1</sup> The circumstances that gave rise to the two preceding cases remind us of what Bynkershoek says of the African States: "*Sed his magistris in jure publico, nemo facile utetur.*" Q. J. P. l. i. c. 15.

<sup>2</sup> [See The Emmanuel, 1 C. Rob. 296.]

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The Concordia. 2 C. Rob.

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trade between the colony and the mother country, give freight, until I am instructed so to do by the superior court.<sup>1</sup>

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THE CONCORDIA, Bayzard, master.

[ \* 102 ]

July 16, 1799.

Restitution in value of a cargo found deficient.<sup>2</sup>

THIS was a case of a petition to the court, to allow a compensation for an embezzlement said to have been committed by the captors, in goods which had been decreed to be restored on a former day.

For the claimant, *Swabey* submitted — That the claimant was entitled, under a decree of restitution, to receive the goods as per invoice; that although it was sworn, in the preparatory examinations, that bulk had not been broken, it was found, on attending to receive restitution, that in two packages there was a deficiency in the number of bales of linen, — there being in one a deficiency of seventeen, in the other there being found twenty-two only instead

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<sup>1</sup> In *The Emanuel Soderstrom*, *vide supra*, vol. i. p. 296, the court refused to give freight to neutral vessels carrying a cargo between different ports of the enemy's country. In *The Wilhelmina*, Carlson, 23d July, 1799, which was a Danish ship taken on a voyage from Havre to Amsterdam — on motion for freight,

The COURT. In the case of neutral ships engaged in the coasting trade of the enemy this court does not give freight; but I think this rule has not been applied to voyages from the port of one enemy to the port of another. There have been cases in which the court has given freight on such voyages, where there have not appeared any fraudulent or false proceedings in the conduct of the ship; and I think that voyages of this kind are very distinguishable from the other. In those the freight is refused because the parties have engaged in the coasting trade of the enemy, which was peculiarly and exclusively his own. This sort of traffic from one of his ports to the ports of another country has always been open; and is, in its own nature, subject to the uses of all mankind who are not in a state of hostility with him. The Dane has a perfect right, in time of profound peace, to trade between Holland and France to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war.

Freight and expenses given.

<sup>2</sup> [See *The Betsey*, 1 C. Rob. 96, n.; *The Providentia*, 2 C. Rob. 149, n.; *The Fire Damer*, 5 C. Rob. 357. Also *The Acteon*, 2 Dod. 58, note.]

of fifty-two. It was prayed that it might be referred to the registrar and merchants, to estimate the value of the things missing; and that it might be charged on the captors, as the persons against whom the claimant was entitled to resort.

For the captor, the *King's Advocate* submitted — That it was necessary to prove the goods were actually on board; that the bill of lading only mentioned the two cases without specifying their contents; that the invoice was not verified, nor on board, and not produced till the time of restitution, and, therefore, that there was not a sufficient *constat* that it contained the true representation.

COURT. There is an affidavit of the lader stating the quantity, and there is also an affidavit of the mate of the American vessel, in which he swears that the prize-master demanded the keys and forced open the packages.

[ \*103 ] \* The *King's Advocate* then submitted that the prize had been delivered up to the Dutch commissioners; that, if it was meant to affect the captors, there should be some affidavit relative to the warehouse account of the commissioners.

*Swabey.* The captor is liable by law.

COURT. The claimant must have his compensation in some way, either against the captor or against the Dutch commissioners. I think he has made out his case as to the deficiency; and it is not proper that, having so done, he should be obliged to come repeatedly before the court to recover property taken from him. Are the captors or the Dutch commissioners in possession? (It being answered by the King's Proctor that the Dutch commissioners were,) — Then I shall direct a monition against them, to show cause why they should not make up the alleged deficiencies; for it appears to me to have been rather incumbent upon them to have set the matter right with the claimant in the first instance. If the original captor was in fault as to the embezzlement, I should have attended to any complaint made and supported by the commissioners against him. But if the government, by its commissioners, take the property out of the hands of the captors, I shall not send the claimants, in the first instance, to hunt after these captors for a full restitution; but those who are in possession must make the restitution, and then call upon the captors to make good the deficiencies of embezzlements happening whilst the cargo continued in their hands. It is not a thing

becoming the justice of this country, that the subjects of other states should be put to inconvenience about the recovery \* of their property, merely because it has been taken out of [ \* 104 ] the hands of the seizors to answer purposes of British convenience.

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THE RISING SUN, Wilkye, master.

July 16, 1799.

Proof of property ; effect of spoliation of papers as to farther proof.<sup>1</sup>

THIS was a case of an American vessel, taken 10th June, 1796; on a voyage from a French port ostensibly to Altona, but in reality bound to Guernsey. The ship had been restored 24th June, reserving the question of freight, demurrage, and expenses.

The cause now came on upon the property of the cargo, in which a question arose respecting the effect of a spoliation of papers.

JUDGMENT.

SIR WILLIAM SCOTT. This is the case of a cargo of considerable value on board a ship that has been restored as an American vessel ; a claim has been given for the greatest part as the property of the master ; a small part has been claimed for the owner of the vessel, and a part for Mr. Walter Seaman, a passenger on board. On the claim, I must observe, that it is given in at a late period, and in very general terms. It might have been expected that the master, being so large a proprietor, would have claimed for himself, and in a specific proportion ; but the claim is given generally " for the owner and the master," without distinguishing their respective shares. The court was left to suppose they were claimants of undivided shares ; in that case the claim would have been proper. But where the proprietors are not partners, it is certainly \* not proper [ \* 105 ] to claim in that manner, but the respective interest should be specifically set forth. The witnesses in this case are, the master, Mr. Walter Seaman, and two others. Many particulars have been pointed out as affecting the credit of the master, which do not make

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<sup>1</sup> [The Hunter, 1 Dod. 480 ; The Two Brothers, 1 C. Rob. 133 ; The St. Lawrence, 8 Cranch, 434.]

any very great impression on me. He says, "that part of the cargo was laden by himself;" whereas the bill of lading describes other persons as the laders; but he might mean that it was done by his orders, and I should not consider that as materially impeaching his credit. The destination is also very inaccurately expressed, some of the papers describing it to have been to Charleston, others stating it to have been to Altona, whereas the true destination was to Guernsey; but as they are both neutral ports, I do not think there is much in that, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port. But there is one fact, which does, I think, go very much to his discredit, and that is the spoliation of papers. It is admitted that there was a spoliation of papers; and the parties in that act were the master and Mr. Walter Seaman.

The master says, to the 16th, "that there were eight or nine letters under the care of Seaman, but that he took them from him on the appearance of the chasing vessel, which he supposed to be a French vessel, as it came from the French coast;" from which I am led to suppose that they were letters which he had confided to Seaman, but took them from him on the apprehension of being chased by a French cruiser. But Seaman does not give a very ingenuous account of this matter. He says, "that he took the letters in port, not say-  
[ \* 106 ] ing from whom he received them; \* therefore I must infer that he received them from the master. There is no reason

given for destroying them, and it has been justly observed, that if this is American property, and the letters applied to that, they would have been preserved as the best evidence to protect the cargo as American property, but that if the property belonged to merchants at Guernsey, or to British merchants, there might then be good reason for such a suppression. It has been said, in explanation, that they might be destroyed, that no contradiction might arise to the ostensible destination; but it is well known that although it is the ordinary form of clearing out from a belligerent country to bear an ostensible destination to a neutral port, yet no one imputes that as a fraud, nor is it considered as such an act as would justly subject neutral property, on board neutral ships, to be molested on that account. Here, then, is a spoliation unaccounted for, and unexplained, traced home to the master of the vessel, who is also the asserted owner of a great part of the cargo. Spoliation is not, alone, in our courts of admiralty, a cause of condemnation; but if other circumstances occur to raise suspicion, it is too much to say of a spoliation of papers, that the possession of that act shall not have the aid of the court, or be maintained by the farther proof, if farther proof is necessary. Let us now review the history of the case. The master came from

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The Rising Sun. 2 C. Rob.

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America not long before, in this ship, a vessel of about two hundred tons, but without a cargo. He brought a letter of introduction from his owners, and instructions from them, but there is not the slightest trace of any fund for himself. There are two letters showing that the American owners trusted to his discretion to [\* 107] obtain freight, and that he was directed to receive moneys due to them from the French government, and if he failed in that, he had a letter of credit to a house in London, which is to assist him in managing his plans; but there is not the slightest intimation that he was to turn merchant on his own account. The ship came from America to London with rice; she then went to Amsterdam, and from Amsterdam to Bourdeaux, and from Bourdeaux, with cotton, to Guernsey, which she delivered to merchants there as the agents of persons in London. The merchant at Guernsey paid his freight, and they gave him besides 431*l.* with a power to draw on merchants at Hamburg for 12 or 15,000 livres, which he was to dispose of as he pleased, on his own account; so that there is about 6,000*l.*, the greatest part in actual specie, with which they intrusted this man, exposed to the risks of the sea, and to be employed as he should think fit. He went to Bourdeaux, and took on board this cargo of brandy; and he farther says, "that if he had reached Guernsey he was to have consigned the cargo to those merchants, and to have given them the commission; that they were to have taken 5 per cent. on the amount, and paid themselves out of the proceeds." Now this is so utterly incredible, that the court must have the faith of ten men to believe it on the original evidence. The story is so excessively improbable, that nothing but the clearest case, in point of evidence, could induce me to restore the great part of this cargo, which is claimed as the master's property; but when I find that all this has been connected with a spoliation of papers, and a spoliation by this man, and that there is not a scrap of paper on [\* 108] board showing his correspondence with the persons at Guernsey — these circumstances, connected with the other improbabilities, are decisive, and do, I think, fully justify me to reject this claim.

With respect to the property of the owners, it would be going too far to say that they are precluded from farther proof. It appears that they are persons of property. The master was to receive the profits of some former freights in France; and it appears, also, that he had made several freights for them, and that he was to have credit in London, with which he was to purchase wines at Bourdeaux. All these circumstances give a fair foundation to this part of the case. It would, I think, be too hard to hold them concluded by this man's

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The Vrow Johanna. 2 C. Rob.

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misconduct; the evidence of their property is not at present sufficient, but it may be restored on farther proof, and I shall direct farther proof to be made of their property.

With respect to Mr. Walter Seaman, I observe his claim is of small amount, and I should be unwilling to give him much trouble about it; but as he was in some degree concerned in this spoliation, and considering that he went on board at Guernsey, and that he appears not to have been so short a time in Europe as he represents, I think these are circumstances that require farther explanation. I shall direct farther proof to be made of his property.

It was submitted by the King's Advocate that as far as freight was concerned, the owners were legally bound by the misconduct of the master, by the spoliation of papers.

Court. It is certainly the general rule.

[\* 109] \**Arnold*. This is a case in which the owners were at a great distance, and no way privy to this act.

Court. It may be hard in many cases, but men must abide the consequences of their own misplaced confidence.

Freight refused.

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THE VROW JOHANNA, Okhen, master.

July 18, 1799.

Blockade of Amsterdam.

[A blockade once notified is presumed to still exist.]<sup>1</sup>

THIS was a case of a ship taken, 16th December, 1799, and proceeded against for a breach of the blockade of Amsterdam, having sailed from Petersburg for that port, November 6, 1798.

Court. The cases alluded to of the blockade, set up by the Dutch in the wars of the last century, have no immediate application to this case; that was a blockade of the whole coast of their enemy; the present case stands on the question of a blockade of Amsterdam, and not of the coast. It is not denied that if a vessel sail for a blockaded

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<sup>1</sup> [The *Betsy*, 1 C. Rob. 332, 334.]



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The *Neptunus*. 2 C. Rob.

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port, after having received notification of the blockade, the act of sailing is to be considered as a breach of the blockade. The only question is then, Whether the blockade notified on the 11th June, and not revoked, is to be considered as continuing at this time? She sailed on the 6th of November. Am I to presume that the blockade so notified did not exist? I cannot presume it, nor could those concerned in despatching the ship have entertained such a presumption. I hold it to be the duty of a country notifying a blockade, to notify the revocation also. There had been no such revocation notified, \*and, therefore, I must presume that it was still [\* 110] existing. I hold, that a ship and cargo sailing for Amsterdam at that time, are liable to condemnation.

Condemned.

On application of the agent for the cargo, that the sentence respecting that might stand over for some inquiry, it was allowed.

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THE NEPTUNUS, Hempel, master.

July 18, 1799.

Blockade of Havre.

[Misrepresentation by a cruiser as to a fact, an excuse.]<sup>1</sup>

THIS was a case of a vessel sailing on a voyage from Dantzick to Havre, 26th October, 1798, and taken in attempting to enter that port on 26th November.

For the captors, the *King's Advocate* stated, That the ship was taken in attempting to enter a blockaded port in pursuance of her original destination, and was therefore liable to confiscation, unless some sufficient ground of justification could be shown. That the master's averment of a general ignorance could not be received, in the case of a blockade notified by public declaration. That as to the particular information which the master pretended to have received

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<sup>1</sup> [The *Juffrow Maria Schroeder*, 3 C. Rob. 157. But misinformation as to the law will not be an excuse. The *Comet*, 1 Edw. 32, 34. Nor a permission in violation of law. The *Comet*, 1 Edw. 32. The *Courier*, 1 Edw. 249.]

from a British frigate in the North Seas, "That Havre was not blockaded," it was immaterial, as it came too late to discharge the penalty, which had been incurred by the act of sailing, and for which the vessel might have been seized by the frigate. That her course had not been altered in consequence of the information, [ \* 111 ] and, therefore, that she \*stood exactly in the same situation as if she had never received it.

## JUDGMENT.

SIR W. SCOTT. This is a case of a ship and cargo seized in the act of entering the port of Havre in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d February, 1798, and this transaction happened in November in that year. The effect of a notification to any foreign government<sup>1</sup> would clearly be to include all

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<sup>1</sup> Respecting the effect of notification as to the subjects of those states to whom it was not directly made : —

August 22, 1799. In the case of The Adelaide, Rose, a Bremen ship, which had sailed into Amsterdam from America, September, 1798, and was captured in her voyage outward in April, 1799, it was contended that the penalty did not attach; that by the master's evidence it appeared that he was ignorant of the fact; that he sailed in September from a distant country, without seeing any blockading force; that at the time of sailing outward he met with only that one ship, which seized him; that no notification had been made to the Hans Towns, and, therefore, as to them, it was a blockade existing *de facto* only, of which the master might be allowed to plead his ignorance; that the penal consequences of a notification given to one power, did not affect the subjects of another state that had not received any notification. It was prayed that the claimant might be allowed to prove the *bonâ fide* ignorance of the master, and that no notification had been made of the blockade of Amsterdam to the Hans Towns.

COURT. This ship is proceeded against on account of having broken the blockade of Amsterdam. The court has often decided that egress is as much a breach of blockade as ingress, if it be done fraudulently. The notification was made to different governments of Europe, on the 11th of June, 1798; this ship sailed in from America, in September of that year, ignorant of the fact; but it by no means follows from that circumstance that the blockade was raised, as it might be suspended by accidents which would not make it legally cease to exist. She proceeded to take in a cargo in the months of November and December, and sails on the 24th of April, 1799. The offence is, therefore, in the egress. That no notification was made to the Hans Towns is a suggestion of counsel, which makes no part of the affidavit. I will go so far as to accede to the position, that the notification would not affect such a case from the same time, and in the same manner, as it would affect the subjects of those states to whom it was directly made. But that it does not affect at any time is going too far; because, if a notification is made to the principal states of Europe, I think a time would come when it would affect the rest; not so much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. It is the duty of a state to make the notification as general as possible. But I must think, that a time would come when a noti-

the \* individuals of that nation ; it would be the most nugatory [ \* 112 ] thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign \* governments to com- [ \* 113 ] municate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification ; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former the act of sailing to a blockaded place \* is [ \* 114 ] sufficient to constitute the offence.<sup>1</sup> It is to be presumed

fication to neighboring powers would affect those to whom it was not directly made. From the moment that a notification is made to a government, it binds the subjects of that state ; because it is supposed to circulate through the whole country. But suppose a notification is made to Sweden and Denmark, it would become the general topic of conversation ; and it would be scarcely possible that it should not have travelled to the ears of a Bremen man ; and although it might not be so early known to him as to the subjects of the states to which it was immediately addressed, yet, in process of time, it must reach him ; and must be considered to impose the same observance of it on him. It would strongly affect him with the knowledge of the fact, that the blockade was *de facto* existing. Therefore, on these grounds, I should hold that although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet, in a reasonable time, it must affect neighboring states with knowledge, as a reasonable ground of evidence ; and I think I do not strain the matter in laying down this rule. As to the circumstances of this particular case, at Amsterdam, it must have been a subject of general notoriety that the port was legally considered by the English in a state of blockade ; and it is impossible that it should not have come to the knowledge of this man after he came in ; it is not to be said by any person, " although I know a blockade exists, yet, because it has not been notified to my court, I will carry out a cargo." I cannot but think that it would have been a very fraudulent omission to take no notice of what was a subject of general notoriety in the place. If it was known to every Dane and Swede, it is impossible that it should not be known to this man. It is not more likely to have been unknown to this vessel, from the circumstance of its being a Bremen ship, when we consider the particular relation which Bremen bears to the sovereign of this country. As to the affidavit of the master, I should receive that with great distrust. Masters have a direct interest to raise the blockade as soon as possible ; therefore their affidavits come with a dead weight about them, that must very much sink their credit whenever they are produced. I hold that the master must have known of the blockade, notwithstanding he and his men swear they did not ; and, therefore, that the ship is penally liable to confiscation.

Ship condemned. Cargo ordered to stand over. Master's private adventure restored.

<sup>1</sup> [Provided it is with the intention to break the blockade on getting there. *Me-deiros v. Hill*, 8 Bing. 231.]

that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination. But this is a case of a vessel from Dantzick after the notification, and the master cannot be heard to aver his ignorance of it. He sails. Till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken *in delicto*, and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined and liberated by the captain of an English frigate belonging to that fleet, who told him that he might proceed on his destination; and who, on being asked, whether Havre was under a blockade? said, "It was not blockaded;" and wished him a good voyage. The question is, In what light he is to be considered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwise have seized the vessel. The fleet must have been ignorant of the fact; and I have to lament that they were so. When a blockade is laid on, it ought, by some kind of communication, to be made known not only to foreign governments, but to the king's subjects, and particularly to the king's \*cruisers; not only to those stationed at the blockaded port, but to others, and especially considerable fleets, that are stationed *in itinere*, to such a port, from the different trading countries that may be supposed to have an intercourse with it. Perhaps it would have been safer in the English captain to have answered, that he could not say any thing of the situation of Havre; but the fact is, (and it has not been contradicted,) that the British officer told the master, "that Havre was not blockaded." Under these circumstances I think, that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port. It is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

From that time, I consider that a state of innocence commences. The man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly.

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The Juno. 2 C. Rob.

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I think I cannot look retrospectively to the state in which he stood before the meeting with the British fleet, and, therefore, I shall direct this vessel and cargo to be restored.

\* THE JUNO, Beard, master.

[ \* 116 ]

July 18, 1799.

Blockade of Amsterdam. Effect of terms of a license to the ports of the Vlie, &c.<sup>1</sup>

THIS was a case respecting the meaning and effect of a license, granted to an American ship, to go to the ports of the Vlie.

JUDGMENT.

SIR W. SCOTT. This is a case arising out of the blockade of Amsterdam; it is a case of an American vessel coming from America without any knowledge of the blockade of Amsterdam, and bringing a cargo for that port. She came to Falmouth, and then, finding that the port of Amsterdam was under blockade, she petitioned for a license, and obtained one from this government, and, as I understand the master through the whole of his depositions, "a license to go to Amsterdam." This he states in stating his difficulties, and the means he took to relieve himself. The application was "for leave to export to the Vlie, Embden, or Rotterdam;" but the terms of the permission are an enlargement of his petition, for they are "to the ports of the Vlie, Embden, Rotterdam, or elsewhere." Whether the petition was an imposition, and framed with a design of deceiving government, will appear on the inquiry which has been directed to be made. If the petition was in the usual form, and if the license was understood by those who granted it to permit exportation to Amsterdam, it will clear up that part of the case; as to any opinion that I can form, I own, that although the license is expressed in this general way, "the ports of the Vlie," I cannot but think that it must have included Amsterdam, which is one of those ports; for it is not to be supposed but that they would \*intend to grant [ \* 117 ] the license in a natural and intelligible form, and not so as to keep the parties in the dark as to its extent. But it is argued,

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<sup>1</sup> [The Byfield, 1 Edw. 190.]

that, allowing it to have been properly obtained, it was not properly used; because it was at any rate a license to go to Amsterdam through the Vlie passage, whereas this vessel was taken entering the Texel; and that there might be many reasons for making the distinction in the license, and, therefore, that it ought to be strictly observed. Now having heard it constantly argued, and having myself adopted the interpretation, that the blockade extended to one passage as well as to the other, and that the whole Zuyder Zee was shut up, I shall not go back again and restrict this interpretation, and say it is confined to one passage only. I shall hold *e converso*, that if a license is given to go through the Vlie, it is not substantially violated by going through another passage, unless it is shown to me that it contained some specific prohibition as to other passages. Supposing it to have been honestly obtained for Amsterdam through the Vlie, I shall not hold it to have been a material deviation to go another way, unless some special prohibition, or unless some special inconvenience is shown, which the party was bound to take notice of.

It has been truly said, that a license is a thing *stricti juris*, a *privilegium*, which a man does not possess by his own right, but that it is conceded to him as an indulgence, and, therefore, that it is to be strictly observed. At the same time, I am to remember, that this is a license to relax a right which bears pretty hardly, though justly, on other countries. To shut up the ports of a country, and exclude neutrals from all commerce with it, is a great inconvenience [ \* 118 ] \* upon them, although it is one to which they are bound to submit; for there is no one principle of the law of nations better established, than that a belligerent has a right to impose a blockade on the ports of his enemy; it may be incommodious to others, but, if there is any such thing as a law of nations, I hold this principle to be as firmly established from the earliest times, and by the general practice of mankind, as any one law whatever. It is, however, a harsh right, and though a license is a privilege, I am not disposed to apply that exposition in the strictest manner to a blockade, but rather think that licenses in such a case are to be favorably regarded, and that it imports the good faith and honor of the government which grants them, not to press the letter too rigorously. I will go farther, and say, that if I was convinced that there had been an honest mistake on such a matter; if there appeared nothing insidious, nothing more than a misapprehension on the part of the neutral master, I should not apply, too strictly, the maxim, *ignorantia juris non excusat*, against a foreigner, mistaking the exact meaning of a license of another country; and in so doing should persuade myself

I did no more than what an equitable regard to the honor of the try which granted such a license must be supposed to require.

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The *Juno*. 2 C. Rob.

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The license is, "To carry a cargo to the ports of the Vlie or elsewhere;" with several provisions, amongst which there certainly is no proviso that she shall come out again; but that is a benefit incidental to the license, and inseparable from it; for it cannot be imagined that she was to go there, and be shut up and incarcerated, and become herself an object of the blockade. A ship that has entered previous to the blockade may \*retire in ballast, or taking a [\* 119] cargo that had been put on board before the blockade. This is the distinction which I have held, and shall hold, till I am corrected by a superior court. The license is silent on that point; but having said, that if I was convinced the party acted under an honest application of his license, though erroneously, I should think him entitled to the most liberal interpretation, it will be proper for me to consider what the man did, that I may see, supposing that there has been a mistake, whether it was a mistake of honest conduct, purely erroneous and innocent; thinking, that, if it is so, it would be sufficient for the present case. The master takes the returned cargo on board, and comes to a port of this kingdom, and solicits the protection of a convoy, acting as openly and with as little concealment as possible. There is nothing in the *res gesta* on which the imputation of fraud can be fixed. Is there any thing in the license to instruct him, that he was not at liberty to take a cargo, or to act as if the blockade was, in regard to him, entirely relaxed? If so, he would be bound to take notice of it. But I see this distinction, which might reasonably affect the mind of a man going in under such a license. He goes in under the direct authority of the belligerent, and might suppose his privilege more extensive than that of a neutral vessel previously there. A neutral has no right to say, I am here accidentally, and therefore I have a right to take out a cargo notwithstanding the blockade;<sup>1</sup> but this man goes in with a permission, which takes off, as to him, the first and primary object of the blockade, the prohibition of taking in a cargo; and I think he might conceive himself to be \*distinguished from the ordinary [\* 120] case of other neutrals previously there. If any inconvenience is likely to arise from this, if government did not mean that his license should have this effect, it might have been distinctly expressed; the proviso might have been inserted, that he should not bring a cargo away; and then all persons would see a clear path before them, and know how to conduct themselves in this very delicate situation.

On the legal effect of such a license, it is not necessary for me to determine. I see no fraud in the interpretation of this license, and if

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<sup>1</sup> [See *The Vrow Judith*, 1 C. Rob. 152 note.]

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The Juno. 2 C. Rob.

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it turns out that this was the form in which licenses were usually granted, I shall not think myself warranted to say that this man was guilty (if guilty at all,) of any thing more than an innocent misapprehension; and in a matter, in which I shall hold such a misapprehension to carry no consequences of penalty after it.

July 24th, 1799. This case having stood for inquiry, as to the usual form of granting licenses, the King's Advocate said he had obtained no particular information, but that after what had fallen from the court he did not mean to press the matter any farther.

Ship restored.

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In the same case.

July 25, 1799.

Verification of papers by carrier-masters, in what degree required.

ON the hearing, as to the cargo, July 25, 1799, the *King's Advocate* contended, That it must go to farther proof, unless all the rules of practice were broken down, that goods shipped in the [ \* 121 ] enemy's country \* were to be considered *primâ facie* as the property of the enemy, and could only be taken out of that presumption by fair and unbiassed evidence, and not from evidence supplied only from the enemy. That the bills of lading and attestation in this case were of the latter description — put on board by the enemy shipper, whilst the master, who was always expected to verify his papers, to the 12th interrogatory says only, "that the laders of the cargo were Hollanders; and farther he cannot depose."

On the part of the claimant, *Laurence* argued, That if farther proof was to be required in this case, it would be impossible for owners of cargoes, put on board carrier-ships, to obtain restitution in any case on the original evidence; as a carrier-master could not be so particularly acquainted with the several owners, or know anything of their course of trading, so as to enable him to swear to their property; that the bill of lading expressed account and risk, and there was an attestation of property on board; and that the master, swearing to the 13th and 27th interrogatories, "that all his papers were true, and that he knew of nothing to affect their credit," did in effect afford a sufficient verification.



## JUDGMENT.

SIR WM. SCOTT. The present application to the court is to dismiss a cargo taken on board in Holland, on the ground that the proof in the case is sufficient according to the practice, or what ought to be the practice of this court. I presume it will not be contended, that no proof is necessary in the case of a cargo taken on board in the enemy's country; and \*where there is no proof arising [ \* 122 ] from the documents or the depositions, the court is not to consider so much what that proof ought to be, as what is required by the practice of the court; for I sit here, not as a legislator, but to administer the law that I find existing. If a reform is necessary, it must be sought elsewhere: the court is neither to make law, nor apologize for it.

The rule is, as I have always understood it, in the Court of Admiralty, that papers by themselves prove nothing; they are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. Those who look back to the elaborate exposition of the proceedings of our Courts of Admiralty, in the answer to the Prussian Memorial, will find this to have been laid down as a fundamental position, "that the master must verify his papers." It is true that, in the case of a carrier-master, it may be expected that the verification should be less positive, than where he is himself the agent; but this is expected,—that he should depose at least that he believes the cargo to be as asserted in the claim; less than that I never remember to have been accepted in any case: and if it were necessary for me to apologize for the rules which I find established in this court, I think this might be vindicated on every principle of reason and justice. When a cargo is taken on board in an enemy's port, and that port blockaded, (which is a circumstance of some weight, as affording a greater temptation to fraud,) if the master is not required to say even that he believes the property to be as claimed, it would open the door to every sort of abuse; but it is said, the master does \*go this length, in swearing "that all [ \* 123 ] the papers are true," and that this amounts to a verification of the property. So he does, if you take that part of his deposition substantively, and apart from the rest; but looking to other parts, and finding, that when he is asked, on the 12th interrogatory, what he knows or believes? (for he is examined to his belief,) he can depose nothing, and that he has no belief, it is impossible to say that this man's deposition confirms the papers in the manner in which it is necessary that they should be supported. It is said there are other papers which supply this defect,—the attestations of the laders before the American Consul. What authority has an American Consul to

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The *Hurtige Hane*. 2 C. Rob.

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administer an oath to Dutch subjects? Such papers can hardly be taken as sworn documents, or if they were, they come only from the Dutch shippers, the very persons, who, if there is any fraud, have been the contrivers of it. Under such circumstances can it be reasonably or candidly addressed to the court to restore this cargo immediately and without farther proof? This ship goes under license to a blockaded port, with a cargo addressed to one set of merchants only. Here are various parcels for a variety of different persons, the master evidently knowing nothing of the matter, and there being no proof but from the Dutch laders. I must say that I am not satisfied. The rules of the court require further proof, and I feel that it is a rule which I could not relax without relaxing the essential demands of justice.

*Arnold* prayed freight and expenses for the ship to be a charge on the cargo.

[\* 124] \* COURT. I am of opinion that the master is entitled to his freight and expenses on two grounds. If he had taken no cargo, he would not have been liable to be stopped; and secondly, having received this cargo, so improperly documented, on board, he would have been liable to have been stopped on that account, although he had not been coming from a blockaded port.

Freight and expenses given, and to be a charge on the cargo.

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THE HURTIGE HANE, Dahl, master.

July 19, 1799.

Breach of blockade of Amsterdam. Excuse, asserted distress. How received.<sup>1</sup>

THIS was a case of a Danish ship taken in the act of entering the Texel, April, 1799, having sailed from a port in Barbary, with an asserted original destination to Hamburg, February 15, 1799.

It was prayed that the court would permit a protest of the master

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<sup>1</sup> [As for other cases of alleged distress, see *The Fortuna*, 5 C. Rob. 27; *The Christiansberg*, 6 C. Rob. 376; *The Charlotta*, 1 Edw. 252; *The Elizabeth*, 1 Edw. 198.]

to be read, in which it would appear, that he was under the necessity of going into the Texel from distress and want of water, and that his crew rose upon him, and insisted that he should go into some Dutch port.

COURT. This ship was found in the act of entering the Texel, a fact by no means indifferent, but highly criminal, *prima facie* at least, and requiring a very satisfactory explanation. It is usual to set up the want of water and provisions as an excuse; and if I was to admit pretences of this sort, a blockade would be \*nothing more than an idle ceremony. Such pretences are, [ \* 125 ] in the first instance, extremely discredited on two grounds — that the fact is strongly against them, and that the explanation is always dubious, and liable to the imputation of coming from an interested quarter. I am not deaf to the fair pretensions of human testimony, but, at the same time, I cannot shut my senses against the ordinary course of human conduct. I will not say that cases of necessity may not occur, that would afford a sufficient justification; and I add, that if the party can show that they were under any great necessity, and that, for four or five days before, they could get into no other port but the Texel, I would certainly admit such an excuse, so supported. But if they cannot do this, and unless it is proved, that in coming up the channel there was no other port, either English or French, but the interdicted port of Amsterdam, into which they could put, I shall reject the apology.

[The protest of the master, the mate, and cook, was admitted to be read, which set forth. “their voyage to Saffee, in November; that, during the time they lay there taking in a cargo, they suffered much by bad weather, and were several times driven out to sea; that on the 15th of February, having completed their lading, the bad weather increasing, they were obliged to cut their cable and proceed on their voyage, leaving the anchor-buoy and cable behind them; that on the 25th the wind blew very hard, with a heavy sea; that the sea broke over their vessel, and forced the ring-bolts from out the deck, washed away the quarter-boards, with two water-casks, and did a great deal of other damage; \* that on the 16th day of March [ \* 126 ] they met with another heavy gale of wind, which obliged them to lie to under their lower sails; that the foresail and schooner-sail were blown out of the ropes, and they were obliged to cut them away and bend new ones; that the sea was so great it made a free passage over the vessel, which caused her to labor and strain very much, and she proved so leaky, they were obliged to keep the pump continually at work; that on the 21st day of March they moved the

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The *Hurtige Hane*. 2 C. Rob.

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cargo to find out the leak, which was at the bottom of the ship, near the foremast, and after cutting away the inside planks they fortunately found and stopped the leak; that on the 23d they saw Scilly, and on the 28th passed Dover, and next day the weather was very bad, with snow and frost; that on the 2d of April they arrived off Yarmouth, near the sands, the wind then blowing a hard gale at east; that they were obliged to set all the sail the vessel could carry, in order to clear the sands; that on the 5th their topsail was blown away, and the wind was so violent that they were obliged to cut away the jib, and the shrouds and deck were covered with snow and ice, and it was with great difficulty they could work the vessel, and next day all the crew came to the master and told him, as they were in want of provisions and water, (they having been under short allowance for some time,) and the said vessel wanted repairing, that they desired him to proceed to the nearest port, and if he did not they would take the command from him; that he was under the necessity of complying with their request, and accordingly steered for Holland.”]

[ \* 127 ] \* COURT. I have now heard the proof brought in, and I am to determine whether it comes up to the rest which I have laid down, and to which I shall certainly adhere, that nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port; considerations of an inferior nature, such as the avoiding higher fees, or slight difficulties, will not be sufficient—nothing less than an unavoidable necessity, which admits of no compromise, and cannot be resisted, will be held by me to be a justification of this offence.

The master sails under a knowledge of the blockade, being affected with the general notification of the preceding year. On the 28th of March they passed Dover, on the 2d of April they were off Yarmouth; but although the protest is made to justify the master from barratry and the crew from mutiny, and does, therefore, I must presume, contain all facts necessary for that purpose, I do not see that it is stated that they were going into Yarmouth. If on the 3d of April there is so much want of water and provisions as to compel them to go into the interdicted ports of the Texel, why not go to the open and permitted port of Yarmouth, on the 2d of April? It is not alleged that the discovery of such a want was first made on the 3d. On the next day, the weather becoming more violent, the crew came to the master, and insisted on going into the nearest port, on account of want of water and provisions. A third excuse is thrown in, that the ship wanted repair; but this is not mentioned in the depositions, and it appears not to have been a very pressing want, as the ship came afterwards

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The *Weelvaart Van Pillaw*. 2 C. Rob.

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back to England without difficulty. They insisted on going into the \*nearest port, saying that they would otherwise [\*128] take the command from him. It does not appear where this happened, nor is it stated that the crew insisted on going to Amsterdam. The master should have said, "The Texel is shut up; I will go to any other port." He does not seem to have felt this necessity in an equal degree with the rest of the crew, as he represents himself "to have been forced in reluctantly." What was there then to carry him to this one interdicted port only? or what reason was there that he could find no other than this, either a little to the north or south? Is there that inevitable necessity which is required? If such pretences as this were to be admitted, I know very well that no one case would come unprovided with an excuse. I shall condemn this vessel. If the parties think themselves aggrieved, they must take the benefit of another court.

Ship condemned.

On application for the master's private adventure,

Court. Strictly speaking, perhaps it ought not to be granted in this case; but as I wish to show this description of men every degree of indulgence, I shall recommend it to the captors to consent to it.<sup>1</sup>

[For a report of another part of this case see 3 C. Rob. 320.]

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THE *WEELVAART VAN PILLAW*, Botter, master.

July 19, 1799.

Breach of blockade of Amsterdam, a vessel having escaped the blockading force.  
[Offence not purged till end of voyage.]<sup>2</sup>

THIS was a case of a Prussian ship, taken April, 1799, off Dungeness, and proceeded against for a breach of the blockade of Amsterdam, having sailed from thence with a cargo in March.

For the claimant, *Laurence* said, That there was \*an [\*129] affidavit offered by the party, to show the ignorance of per-

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<sup>1</sup> [See note to the *Calypso*, 2 C. Rob. 298.]

<sup>2</sup> [The *Juffrow Maria Schroeder*, 3 C. Rob. 153; The *General Hamilton*, 6 C. Rob. 61. Unless the blockade is sooner raised. 6 C. Rob. 387.]

sons at Amsterdam, as to the blockade of that port, till the second notification<sup>1</sup> was published there 12th April, 1799; but as the court had determined that it should consider the notification of June preceding to be still in force till it is recalled, it was unnecessary to mention that affidavit farther than to form a ground of exception on appeal. It was farther said, that the matter of the affidavit was aided by the circumstance of the capture not having been made by any blockading force, nor near the mouth of the port, which raised a strong presumption that the blockade was not actually kept up; that the rule which the court had laid down respecting the continuance of a blockade by notification, applied to neutral states, and ships going in; that in respect to ships coming out of a blockaded port, the nature of a blockade prevented vessels lying there from having any other notice than the fact; and that, if the actual blockade was not kept up in force, they had no other reason to presume a continuance, and were not *in delicto* for coming out as this vessel did, when there was no ship lying near the port to prevent her.

## JUDGMENT.

SIR W. SCOTT. There seem to be two grounds on which something of an indulgence is claimed in the present case. It is said that it was not a matter of notoriety in Amsterdam that the blockade was still continued; that a notification is addressed to neutral states, and therefore that a ship in the blockaded port may plead ignorance.

But I am to remember that this is not a Dutch ship but a [\* 130] Prussian ship, and that it was the duty of the Prussian government, having received the public notification many months before, to have communicated it to their subjects in different ports. Another circumstance on which exemption is prayed, is, that she had escaped the interior circumvallation, if I may so call it; that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument; if the principal is found, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force, you are free; this would be a most absurd application of the principle. If that is found, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated. [*Vide Binkerf. Q. J. P. lib. i. ch. 11.*<sup>2</sup>]

<sup>1</sup> *Vide infra*, p. 131.

<sup>2</sup> Bynkershoek is commenting on the order of the States General, 1630, in these words: *In tertia sanctione eleganter distinctum est, in quem portum naves exeuntes*

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The Jonge Petronella. 2 C. Rob.

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Being of opinion that the principle is sound, I shall hold, that if a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and subject to confiscation.

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\* THE JONGE PETRONELLA, Kens, master. [ \* 131 ]

July 19, 1799.

Blockade of the ports of the United Provinces, 21st March, 1799. Time for communication.  
[A week held insufficient.]<sup>1</sup>

THIS was a case of a Danish ship, which had sailed from Rotterdam on the 28th March, 1799, and was proceeded against for a breach of the blockade of the ports of the United Provinces, notified to foreign ministers on the 21st March, and inserted in the Gazette on the 26th March, 1799.<sup>2</sup>

COURT. There seems to be no question made as to the property of the ship. I do not think a week is sufficient time to affect the parties with a legal knowledge of this blockade; I shall therefore restore this vessel.

Cargo reserved.

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fuerint compulsæ, ut nempe in ipso actu deprehensæ videantur, nam si in eum portum in quem destinarent, pervenerint, absolutum iter intelligitur, & cessat publicatio. Sed ait disjunctim, "haar eigen of daar de reyse gedestineert was," de quorum sensu, & jure, dubitari posset: Sane si proprius portus, et in quem destinatum erat, iidem sint, res quidem caret omnidubio: Sed si Anglus, qui ex Flandria destinarat in Daniam, in portum Anglicum compellatur, & enavigans, iter suum prosecuturus, deprehendatur, antequam portum Danicum subierit, mihi quidem in itinere & ipso actu videretur deprehendi, nec quicquam interesse portus proprius sibi, nec ne, quem ante subierat, si non iter, quod institutum erat, plane fuerat finitum.

<sup>1</sup> [The Calypso, 2 C. Rob. 298.]

<sup>2</sup> "Downing Street, March 21, 1799.

"The King has been pleased to cause it to be signified by the Right Honorable Lord Grenville, his Majesty's Principal Secretary of State for Foreign Affairs, to the ministers of neutral powers residing at this court, that the necessary measures having been taken by his Majesty's commands for the blockade of the ports of the United Provinces, the said ports are declared to be in a state of blockade, and that all vessels which may attempt to enter any of them after this notice, will be dealt with according to the principles of the law of nations, and to the stipulations of such treaties subsisting between his Majesty and foreign powers, as may contain provisions applicable to the cases of towns, places, or ports, in a state of blockade."

[ \* 132 ]      \* THE TWO SUSANNAHS, Braren, master.

July 23, 1799.

Proceeds of sale less than amount of original value. Compensation not allowed in case of justified seizure; and conduct not impeached.<sup>1</sup>

THIS was a case on a prayer for compensation in value, for a cargo taken on board a Danish ship, restored on farther proof, 17th July, 1799, on a suggestion that the amount of the proceeds was considerably less than the original value.

COURT. This is an unfortunate case; the court is very desirous that full justice should be done to the claimants, but the cargo is not equal to it. There is no question about the seizure; that is justified by the order for farther proof. The question is, then, Whether the captors have acted so irregularly as to make themselves liable? It is said that it was very desirable that the cargo should be brought here, and that it has been exposed to accidents by carrying it elsewhere. It was, however, carried to Leghorn, where there is a standing commission of the Admiralty Court. It is said, that loss has been occasioned by selling it too early. Perhaps it might have been better if they had waited; but there is no suggestion that the sale was made for any sinister purposes, or in any manner injurious to the property. Under these circumstances, I cannot think that the captors are answerable for more than the proceeds, it not being shown that they have conducted themselves otherwise than with fair intentions.

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<sup>1</sup> [The Betsey, 1 C. Rob. 93 and note; The Carolina, 4 C. Rob. 256; The John, 2 Dod. 336.]



## \* THE PACKET DE BILBOA, Depucheta, master. [ \* 133 ]

August 6, 1799.

Shipment at the risk of consignor till delivery; allowed — as being made before the war.<sup>1</sup>  
Particular mode of Spanish trade.

THIS was a case of a claim of an English house, for goods shipped on board a Spanish vessel, by the order of Spanish merchants, before hostilities with Spain, and captured December, 1796, on a voyage from London to Corunna.

## JUDGMENT.

SIR WM. SCOTT. This is a claim, of a peculiar nature, for goods sent by British subjects to Spain, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our government, what would be the issue between them. There appears to be no ground to say that this contract was influenced by speculations on the prospect of a war, or that any thing has been specially done to avoid the risks of war. It is sworn in the affidavit of the claimant, "that this is the constant habit and practice of this trade;" whether it is the practice of the Spanish trade generally, or only the particular mode of these individuals in carrying on commerce together, is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, in whom is the legal title? Because, if I should find that the interest was in the Spanish consignee I must then condemn, and leave the British party to apply to the crown for that grace and favor which it is always ready to show, — the property being condemnable to the crown as taken before hostilities.<sup>2</sup>

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<sup>1</sup> [The Anna Catharina, 4 C. Rob. 111, 112; 5 C. Rob. 161.]

<sup>2</sup> [By the laws of nations, in the event of a war, enemies' property, &c., may be confiscated. The Emulous, 1 Gall. 563; S. C. 8 Cranch, 110; 1 Kent, Comm. 56 to 61. The United States have made treaties with the following nations respecting confiscations of property:

Brazil,	viii.	Statutes at Large	396
Central America,	viii.	" "	334
Chili,	viii.	" "	439
Colombia,	viii.	" "	316
Costa Rica,	x.	" "	
Ecuador,	viii.	" "	546
Great Britain,	viii.	" "	126

The statement of the claim sets forth that these goods [ \* 134 ] have not been paid for by the Spaniard. That would go but little way; that alone would not do; there must be many cases in which British merchants suffer from capture by our own cruisers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state "that, according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace, as well as war, is on the consignor; that he insures, and has no remedy against the consignee for any accident that happens during the voyage." Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice that presupposes an agreement amongst such a description of merchants. In time of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted; for it would at once put an end to all captures at sea. The risk would, [ \* 135 ] in all cases, be laid on the consignor \* where it suited the purpose of protection. On every contemplation of a war this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture. It is, therefore, considered to be an invalid contract in time of war, or, to express it more accurately, it is a contract which, if made in war, has this effect, — that the captor has a right to seize it, and convert the property to his own use;<sup>1</sup> for he, having all the

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Guatemala,	x.	"	"	.....
France,	viii.	"	"	.....182
New Granada,	ix.	"	"	.....894
Peru,	x.	"	"	.....
Venezuela,	viii.	"	"	.....478

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For treaties respecting right to withdraw property in case of war, see *The Juffrow Catharina*, 5 C. Rob. 141, note.]

<sup>1</sup> [The *Anna Catharina*, 4 C. Rob. 107; The *Josephine*, 4 C. Rob. 25; The *Aurora*, 4 C. Rob. 218; The *Neptunus*, 6 C. Rob. 409; The *Ann Green*, 1 Gall. 291; The *Atlas*, 3 C. Rob. 299.]

rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy, and the shipper who put it on board during a time of war must be presumed to know the rule, and to secure himself, in his agreement with the consignee, against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment, and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made without any attention to the event of a war. The goods are sent at the risk of the shipper; if they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property that, if you are the person on whom the loss will fall; you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper, "to deliver for you and in your name;" by which [ \* 136 ] it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is, that they were to remain the property of the shipper. As to the payment of freight, that is not material; as, in the end, the purchaser must necessarily pay the carriage. The other consideration,—Who bears the loss?—much outweighs that; neither does the case put show the contrary. The case put is,—Supposing Spain and England both neutral, and that these goods had been taken by the French and sold to great profit, to whose advantage would it have been? The answer is, if the goods were to continue the property of the shipper till delivery, it must have enured to his benefit and not that of the consignee. To make the loss fall upon the shipper in the case of the present shipment, would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in nowise injurious to the rights of any third party. An event subsequently happens which he could in no degree provide against; if he is to be the sufferer, he is a sufferer without notice and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods. The consignee may refuse payment, referring to the terms of the contract, which was made when it was perfectly law-

ful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not [ \* 137 ] easy to discover. \* The goods have never been delivered in Spain; they were to have been at the risk of the shipper till delivery, and this under a perfectly fair contract. I must consider the property to reside still in the English merchant. It is a case altogether different from other cases which have happened on this subject, *flagrante bello*.<sup>1</sup> I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant; that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they [ \* 138 ] had actually arrived in Spain, and had been put into \* the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper.

On prayer that the captor's expenses might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

COURT. I think there has been a great service performed to the shipper. If the goods had not been captured they would have gone into the possession of the enemy. The captor did right in bringing the question before the court, and he ought by no means to be a loser. I shall not give a salvage, but shall direct the expenses of the captor to be paid out of the proceeds.

<sup>1</sup> In the *Noydt Gedacht*, Waalrave, 23d August, 1799, which was a subsequent case of a small Dutch fishing vessel, transferred to the neutral claimant under a condition to reconvey at the end of the war.

The COURT. A sale made by an enemy to neutrals, in time of war, must be an absolute unconditional sale. This transfer is evidently done only to cover the property during the war. The vessel continues in the old trade, and is, in every respect, a Dutch vessel. As to the cargo, the value of the property is very small; and it would be of very little benefit to any party to send the case to farther proof. I must, therefore, dispose of it according to the preponderancy of the present evidence. The master, who, I must say, has spoken very ingenuously, says "that the consignees reside at Dort; that he believes the laders have an interest in the cargo now, but that it would become the property of the consignees on the arrival at Dort; and he gives his reason for this belief, that the lader told him so." On this authority the master undertakes to swear that he believes it to be the property of persons for whom it is claimed. It has been settled by repeated decisions that this will not do, that neutrals should take upon themselves the sea risk and danger of the voyage, will not be allowed. In opposition to what the master states, there are only two certificates, which do not, I think, meet the point. What is there sworn may be very true; and yet the master's account true at the same time. I am inclined, therefore, to adhere to the master's account; and, under it, I must condemn this cargo as Dutch property.

Ship and cargo condemned. [The *Vigilantia*, 1 C. Rob. 1.]

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The *Margaretha Magdalena*. 2 C. Rob.

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## THE MARGARETHA MAGDALENA, Predborn, master.

August 15, 1799.

Trade from the colonies of the enemy. Ship and cargo from Batavia to Copenhagen, on account of Danish merchants, restored.<sup>1</sup>

Effect of contraband on the outward voyage.<sup>2</sup>

THIS was a case of a ship and cargo seized at anchor in St. Helena, September, 1798, on a voyage from Batavia to Copenhagen, and claimed for merchants of Copenhagen.

## JUDGMENT.

SIR WILLIAM SCOTT. This is the case of a ship asserted to be a Danish vessel, and coming with a valuable cargo from Batavia to Copenhagen. It is well known that the Dutch were reduced to extreme distress in the exportation of the very valuable produce of that settlement. That circumstance alone would be sufficient to raise a general suspicion against a trade of this kind; at the same time, it must be acknowledged that it would be sufficient only to authorize search and inquiry, \*without subjecting [\* 139] the ship to any detention for adjudication, unless the general suspicion was still farther aided by other circumstances. It is for the court to inquire whether these suspicions are so aided in the present case. The papers are very full and circumstantial, and all concur in describing the ship and cargo to be Danish property; they are supported by the master, who appears to have been intrusted with a discretionary power to go to Batavia or not, according to the result of an inquiry that he was directed to make at the Cape of Good Hope. It would be difficult, therefore, in this case, to say what sort of farther proof the court should require, if it was disposed to order it; the outward voyage was contingent, and not absolutely to Batavia. It does not appear that there must have been any correspondence with persons there, for the whole was intrusted to the master. It would be difficult, therefore, to say what the court should direct to be produced; and this difficulty would operate with me as one reason against making such an order, unless there were peculiar grounds of suspicion to make it necessary.

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<sup>1</sup> [See *The Providentia*, 2 C. Rob. 142 n.]

<sup>2</sup> [See note to *The Imina*, 3 C. Rob. 168.]

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The Margaretha Magdalena. 2 C. Rob.

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It is certainly an alarming circumstance in this case, that, although the outward cargo appears to have consisted of contraband goods, yet the principal owner appears publicly at Copenhagen, and makes oath "That there were no prohibited goods on board destined to the ports of any party now at war." The master himself describes the cargo that he carried out as "naval stores;" and, on looking into the invoice, I find that they are there represented as "goods to be sold." That being so, I must hold that it was a most noxious exportation, and an act of a very hostile character to send out articles of this description to the enemy, in direct violation of public treaties and of the duty which the owners owe to their own government. I should consider it as an act that would affect the neutral in some degree on this returned voyage; for although a ship, on her return, is not liable to confiscation for having carried a cargo of contraband on her outward voyage, yet it would be a little too much to say that all impression is done away. Because, if it appears that the owner had sent such a cargo under a certificate obtained on a false oath that there was no contraband on board, it could not but affect his credit at least, and induce the court to look very scrupulously to all the actions and representations of such a person. The master says "that there was not more than was necessary for the ship's use;" but this practice is, even with this apology, sufficiently alarming; because it has appeared that other ships have been employed in carrying naval stores to Batavia in the same manner, not as principal cargoes, but in moderate quantities, under pretence of stores for the ship's own use, but which, nevertheless, were sold, as these were, on their arrival at Batavia. It is apparent that the enemy may be supplied in this mode to a very great amount.

What the master says in another place is rather contradictory to this pretence. He says "that there was not more than would be wanting for another ship, which he had a design of purchasing at Batavia." Now, I must say that it could by no means be allowed that neutrals shall be at liberty to carry out a larger quantity of articles of this nature than are wanting for their own ship's use, under a speculation of purchasing other ships; and that, when they are there, the speculation shall be relinquished, and the contraband articles be then sold as stores in the colonies of the enemy. If the speculation was originally, really, and *bonâ fide* entertained, on failure of it the surplus should either be brought back again or sold in some neutral port of that quarter of the world; for neutrals can have no right to carry out double stores of this description for a contingent purpose, and then dispose of

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The Providentia. 2 C. Rob.

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them to the enemy at their pleasure. The master says "that he was authorized to purchase a ship;" but there is no appearance of such a commission in the papers, nor are there any documents relating to it. The articles were entered in the invoice as being for sale; and the fact has actually taken place that they were sold at Batavia. The owner swears that there were no prohibited goods destined for any of the parties now at war. It is not clear, from this expression, whether he meant to swear that it was not for the port or not for the use of an enemy; it is a very equivocal term. It was certainly going to an enemy's port; and if it was to be sold there in failure of the speculation of purchasing a ship there, it was then for the use of the enemy. Upon the whole, I think there was great reason to bring this case to adjudication; it was a case very proper for inquiry. But, after all the inquiry that has been made, I am of opinion that the property of the ship is sufficiently clear, and that there is nothing pointing to any other than a Danish interest in the cargo. If I saw on board any thing of the nature of what has appeared in some other cases from Batavia, I should certainly look a little farther into it; but it appears to me that the outward [\*142] shipment from Copenhagen was sent under the management of the master, to invest the proceeds in the produce of Batavia. If the general nature of the transaction has rendered it liable to suspicion, I can only say that it is a trade in which it is the duty of neutrals to observe a conduct perfectly circumspect and consistent with all obligations of good faith. But I am, under all the circumstances, satisfied that the property is as claimed, and I direct it to be restored.

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THE PROVIDENTIA, Hinch, master.

August 16, 1799.

Trade from the colonies of the enemy.<sup>1</sup> Produce of Vera Cruz, going from that settlement to Hamburg, the property of neutral merchants restored, [though under special license of the enemy.]

THIS was a case of a ship and cargo, having been stopped in a

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<sup>1</sup> [Other cases respecting trade with the enemies' colonies, in *The Margaretha Magdalena*, 2 C. Rob. 138; *The Immanuel*, 2 C. Rob. 186; 4 C. Rob. App. 13, 14, 15; *The Nancy*, 3 C. Rob. 82; *The Minerva*, 3 C. Rob. 229; *The Conferenzrath*, 6 C.

British port 17th March, 1799, on a voyage from Vera Cruz to Hamburg, and claimed for merchants of Hamburg.

For the captor, *King's Advocate*. This is a claim for a ship and a very valuable cargo going from the Spanish settlement of Vera Cruz to Hamburg, on behalf of merchants of Hamburg. In the papers there is nothing appearing to affect the property of the ship and cargo; but it is to be considered that the claimant in this case has been a frequent claimant during the war, and must be a gentleman of much experience in the practice of these courts; and, therefore, it is not to be wondered at, that all the documents are found regularly in order and prepared. There is, however, something in the character and conduct of the master in this business, that does [ \* 143 ] raise a very reasonable suspicion \*on this ground of property. When he was first called upon for his papers he refused to deliver them up till he had consulted his correspondent in town, and the captors were obliged to take out a monition against him for the purpose of obtaining them. There is, besides, something peculiar in his character and situation; he is a young man of twenty-five years, who appears to have been engaged, principally, before this voyage, in travelling into Spain and England, for the purpose of acquiring languages. He then goes to Hamburg, and without having handled a rope, for any thing that appears, he is made master of this vessel, and intrusted with this very important commission to the Spanish colonies, a trade for which he might have had abundant opportunities of forming secret arrangements in Spain, and in which he is more likely to have been employed, in fact, by Spanish merchants than for these gentlemen of Hamburg, for whom the present claim is given.

These observations go to the question of property; but it is, perhaps, unnecessary to agitate that question in the present case, as there is a more important question of law involved, on which, it is submitted, this ship and cargo will be liable to confiscation. It is scarcely necessary to say, that this is the principle of law that was applied to the colonial trade of the enemy in the war of 1756, and which has never since been departed from by this country. The principle was not, as it is sometimes represented, founded on the circumstance of adoption into the enemy's trade by virtue of special licenses or passes; but it rested on the broad ground of interposition

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Rob. 362; The Eenrom, 2 C. Rob. 1. Cases as to the coasting trade and privileged trade of the enemy, carried on by neutrals, The Anna Catharina, 4 C. Rob. 107 n. As to continuity of voyages, see The Maria, 5 C. Rob. 365.]



in the trade of a belligerent, which had not been before open. That \*this is the foundation of the law, appears from this [ \* 144 ] circumstance, that in the course of that war the use of licenses was laid aside, yet still the property taken in that course of trade was made subject to condemnation. Another expedient was also resorted to, of sending the produce to Monte Christi, in the first instance, and of taking it from thence, without going at all to the French islands; but still that was considered as an evasion, and confiscation still followed.

That the trade with the Spanish colonies was not an open trade, and that it was an object of great jealousy and monopoly to the Spanish government, appears evidently from the instructions to the master in this case: "He is first directed to obtain a special permission from the Spanish government to go to Vera Cruz; and, if it should be required of him to return back to a Spanish port, he is to represent it to be impossible, because in that case they would be taken by the English; 'and he is to use every means,' by presents to the governors, to prevent it; he is to use his utmost endeavors to be allowed to clear out for Hamburg, and, at worst, to pay the Cadiz duties." It appears, therefore, that the danger of capture was in view, and an object of chief consideration with all parties. And, therefore, it is, that this expedient of giving bills on Hamburg, conditional on a safe return, is resorted to; it is a case, therefore, that comes expressly under the principles of the war of 1756. These are sound principles, and have never been abandoned by this country. Circumstances had occurred to occasion an opening of the French colonial trade before the present war; but the Spanish colonial trade has ever continued an object of great jealousy, and \*has never been opened to foreign ships, and, therefore, as [ \* 145 ] to them, the old principle still applies in full force.

For the claimants, *Arnold* and *Laurence*. The refusal of the master to deliver the papers on the first application has been so far explained, that it is allowed to have proceeded from mistake rather than from any consciousness of a fraudulent case; no imputation, therefore, arises from that circumstance that requires any answer. As little occasion is there to vindicate the character of the man from the suspicions thrown upon the former part of his history; whatever were his engagements in Spain, it is not probable that they had any connection with this case. The very dates are sufficient to refute such a charge. He lived at Hamburg till 1791; his travels into Spain took place between that time and 1796,—a period when Spain was in alliance with us, and when, therefore, it was not very likely that

fraud should have been concerted against this country. In 1796 he returns again to Hamburg, and it was not till two years after his return that he sets out on this voyage; a very tardy execution, truly, of any fraudulent trade for which he must be supposed to have made his arrangements long before; there is nothing, therefore, to impeach the claim, unless the principle of law which has been started can be maintained as applicable to this case. The practice of the war of 1756 has been relied on; and it is said, that although vessels under a special license were condemned as vessels adopted into the enemy's trade, it was not solely on the ground of the special license that this principle was sustained. But it must be remembered that the principle was first set up to meet the cases of ships sailing under [ \* 146 ] those special licenses, and if it was afterwards extended \* to ships without licenses, or to cargoes taken from Monte Christi, it was merely in prosecution of the same purpose, of counteracting the fraudulent trade of the enemy, which had first shown itself under the contrivance of these special licenses, and of which the later practices were but a variation for the purposes of evasion. It did, therefore, stand principally, and, in its origin, precisely on the circumstance of adoption by means of these licenses; and this will still farther appear, if it is considered that before that period, in the war of 1744, ships taken on a voyage from the French colonies, were released before the Lords of Appeal.

But if it were granted that the interposition in the trade of a belligerent, not before open to foreign traders, made some part of the principle of that war, it would not apply to the cases of this war; for in the late practice of this court, during this war, there have been a variety of cases from the French and Dutch colonies, in which the court has either ordered farther proof, or restored in the first instance, by no means considering them, therefore, as concluded by this circumstance. It is said that this has happened from a variation of facts only, and that circumstances had occasioned a general opening of the French colonial trade before the war, but that is not correct; for the opening of the French trade was not till four days after the declaration of the war by the decree of the convention; the previous opening having been only occasional, and under a discretionary power granted to the governors, for the purpose of obtaining supplies and preventing the danger of famine, a sort of relaxation directly tending to show that they were not generally open, and carrying with it a direct refutation of the argument, attempt- [ \* 147 ] ing to raise a distinction for \* the legality of the French colonial trade, as arising out of any previous alteration in their system. It is said that no such alteration had taken place in Spain;

but it certainly had; and though the Spanish colonies had not been thrown open so soon as the French, yet they were opened before the breaking out of hostilities between this country and Spain, as will appear by the order to our cruisers,<sup>1</sup> in which the trade from the Spanish colonies is expressly mentioned, being considered, evidently, as a trade equally allowable, as the trade from the Dutch or French colonies, and standing on the same footing, whatever that may be.

But it is said that the evidence in this case affords proof to the contrary; and that it comes within the more strict class of cases which occurred in 1756; as there is that special license to be found in this case, but there is no such license on board; the King's Advocate relies on the words of the instructions to the master, but they by no means import such a special license, nor is there any trace that the persons engaged in this business ever conceived that they were engaging in an unlawful trade. The court has an opportunity of seeing every thing relative to this vessel, as well with respect to her outward, as to her homeward cargo. The voyage to Vera Cruz is not mentioned as a thing uncertain, nor as a matter of experiment; there appears to have been no hesitation or doubt in the parties, whether they should be permitted to go to the Spanish colonies or not. It is mentioned in all the papers as an object fully in their own power; the instructions are given in the most unreserved manner, "That if cochineal and indigo were cheap at the Havanna, the master was directed to purchase there;" speaking of it "as a trade by no [\* 148] means new to the parties. "But if he could not get any thing but sugar, for which the vessel would be too small, he was to get a pilot, and proceed to Vera Cruz, taking particular care first to obtain the governor's license;" but this is, perhaps, a license necessary for any ship going there in the nature of a custom house clearance, and not to be considered as a license granting a particular exemption from the general restrictions of the colonial trade. The prices and commodities are all specifically mentioned, showing, again, that the accomplishment of their object was not a matter of contingency, nor of uncertainty and doubt to the parties.

It appears that a general proviso of Spanish licenses was "to return to a Spanish port," and that it was a great object with the parties to prevent this condition; all means were to be used to obtain a license for Hamburg, and, at the worst, the master was to pay the Cadiz duties. From this, it appears what was the motive of this restriction, that the permission to go to Vera Cruz is to be taken as

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<sup>1</sup> January 25, 1798. [Post, App. No. III.]

a ceremonial to which all foreign vessels, and perhaps all Spanish vessels, are subject, for the purpose of securing to the Spanish government this duty. In this case the master had complied, and had obtained a certificate, stating in general terms that he had paid the royal duties, and pointing to no specific favor or indulgence. This is the fair import of the license that is spoken of in the instructions; but whatever might be its nature it would not, of itself, be conclusive after the case which has occurred in this court, in which, although a bond was found on board obliging the master to return to France, yet, notwithstanding, it appearing in evidence on the master's [ \* 149 ] oath that he did not intend to return to France, \* but that he was actually going to Gottenburg, that property was restored. On these grounds, therefore, it is submitted that this vessel was found in a trade not unlawful; that the proofs of property are full and satisfactory; that there being no ground of detention the parties are entitled to restitution; but farther, that as they have sustained great loss by this seizure, a loss imposed on them without reason and without cause on their part, they are entitled to a full indemnification.<sup>1</sup>

#### JUDGMENT.

SIR W. SCOTT. This vessel was seized in the harbor of Penzance, in Cornwall, on a voyage, not disputed, from Vera Cruz to Hamburg. It appears that the master shewed some reluctance in delivering up his papers, or at least in submitting them to inspection, which has been attended with much inconvenience to himself, as it has furnished grounds of suspicion and argument against him. I do not, [ \* 150 ] however, see much ground of accusation against him. It \* is not the case of a man refusing to submit to a lawful cruiser

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<sup>1</sup> On a subsequent day, August 7, 1800, the demand for compensation for loss sustained, owing to the low price of sales, came on to be heard on petition. The principal loss was stated at the difference of the prices of the markets of Hamburg and London. But it was answered, that the original prayer on the part of the claimants was to bring the cargo from Penzance to London for sale; that a wish was expressed by them to sell in a private manner, rather than by public sale, and bail was offered to the amount of the invoice price only; this being not acceded to on the part of captors, the proposal went off; and the cochineal was sold at last in London, by the agent, after restitution. In the argument, a material question was started whether the king, in his office of admiralty, would be subject to cost or damages? But the court being of opinion that it was a case of justifiable seizure, and fit to be brought to adjudication, and that the damage which had been sustained was owing to the conduct of the parties themselves, or their agents, dismissed the petition without entering upon that point of law. The Concordia, 2 C. Rob. 102.

of this country at sea, but it is a case of a man coming into a port, and there meeting a person claiming as deputy of Lord Mount Edgumbe, Vice-Admiral of Cornwall, under the sanction of a commission, which a neutral master might not very well understand. That there was any particular reason of disingenuous craft for such a refusal on his part I do not see, as it is admitted that the evidence of the property of the ship and cargo is complete. The destination also is fully proved; there could be no reason, therefore, for withdrawing the papers from inquiry. Something has been said respecting the character of the master, that he is a young man, and had lately been travelling in Spain, both founding a suspicion that he does not stand in this trade in the character of master of a neutral vessel; but I see no reason why, because he united rather a larger scope of information, he might not also be competently acquainted with the navigation of a vessel. There is no appearance here of that strange animal, a captain of the colors, or captain of the flag, or any character of that kind. He travels previously to the year 1796, but this voyage does not begin till 1798; and I do not think that his travels are likely to have given rise to any fraudulent proceedings in this case. I shall therefore take the case clear of any objection of that sort, and consider it only as a question of law as to the legality of such a trade, whether a neutral ship can lawfully go from her own port in Europe to the colony of an enemy, and there lade a cargo and return with it to her own port?

On this point much has been said on the policy and general reasoning of restricting the trade with the colonies of [\* 151] the enemy during a war; this is a wide field, into which I shall not enter any farther than is necessary. I shall look principally to the king's instructions to his cruisers as the safest guide for this court to follow. All reasoning on general principles on this subject depends much on facts of a very dubious nature, not sufficiently known here either to the counsel or to the court; and as the Superior Court has not given any rule for the direction of this court, I shall think it the safest method to adhere to the king's instructions, and extract from them what I conceive to be the meaning of them.

The first instructions<sup>1</sup> were, to bring in all ships which had been trading with any colony of the enemy; but this country afterwards receded from these directions, and the second orders<sup>2</sup> were, "to bring in all ships laden with the produce of the West India islands, coming directly from the ports of the said islands to any port of

<sup>1</sup> 6th November, 1793. See Appendix, [No. I.]

<sup>2</sup> 8th January, 1794. [No. II.]

Europe." I cannot but consider this as an abandonment of the former law; and I cannot but think that a cruiser, taking this instruction in conjunction with those which had been given before, must have inferred that it was no longer the intention of government to bring in, and much less to confiscate, cargoes of West India produce, unless coming to some port in Europe. This was followed by instructions now in force,<sup>1</sup> which direct the bringing in of all vessels laden with the produce of the French and Spanish settlements, coming directly from the ports of such settlements to any port of Europe other than the ports of that country to which the vessel belongs. It is certainly not laid down in the negative that they shall not bring in such vessels as are coming from such settlements to their own ports; but, looking at the former instructions, I think it was a strong admonition to cruisers not to bring in such ships, and I believe it has been generally so understood and acted upon by them. And, in this court, cargoes brought from Surinam to ports in Europe to which the vessels belonged have been uniformly restored, on proof of the neutrality of the property.

If, then, this is so intended, on what ground is it to be contended that this ship and cargo, being admitted to be going to Hamburg, are subject to condemnation? The only ground on which it has been argued is the special license from the Spanish governor; and it is said that it was intended only to allow the trade to such colonies as were generally open, and not to those where a special pass is necessary. But where do I find that distinction in these instructions? If it was so intended, it ought to have been expressly inserted as an exception. There is nothing in the general terms to direct neutrals to such interpretation; it would be, therefore, to operate with surprise upon them, and to mislead them into a trade to their own undoing, to put such an interpretation upon the king's instructions. Unless it can be shown that it was the particular meaning of the instructions to except vessels under this license, I must hold that it is not in the terms of them to inquire whether they are going with a pass or not. So I understand them, and till I am instructed to the contrary, by the Superior Court, I shall so interpret them as importing a general permission, and as not affected by the special license; the law being simple and universal in its language, and there being nothing to lead me to think that there was any such reserve in the mind of the legislature.

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<sup>1</sup> 25th January, 1798. [App. No. III.]

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The Calypso. 2 C. Rob.

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\* But I am no way satisfied, if it were necessary for me [ \* 153 ] to go farther, that there is such a license in this case. The license should necessarily be such a one as connected itself with the circumstances of this war, giving permission to a ship to go where she would not be allowed to go in time of peace. If it was only a remission of colonial forms, I do not think it would be such a license as could support the argument which has been raised upon it in this case. It has, I think, been admitted, and it has appeared in this case and others, that the Havanna is generally open, but that Vera Cruz is the *Sanctum Sanctorum* of the Spanish settlements, and watched with peculiar jealousy; and I am not sure that even Spanish vessels do not require something of a permission from the government to legalize a voyage from one country to another. The reference to the Spanish governor of the Havanna seems to have been made as a matter of course, in the ordinary conduct of all trade to Vera Cruz, as a sort of clearance to authorize the voyage. As to the condition to return to some port of Spain, which, from his paying the Cadiz duties, it is said might be imposed upon the master, I see nothing in that which will particularly affect him after the various cases from Surinam, in which, although bonds had been given to return to Holland, this court has restored, on the masters' making satisfactory proof that they did not intend to comply with the condition, and intended to submit to the penal forfeiture. I cannot say there is any thing in this circumstance that can subject this cargo to confiscation.

Cases respecting the trade of neutrals with the colonies of the enemy are of considerable delicacy, and therefore I think it has been properly brought before the court; but I restore both ship and cargo.

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THE CALYPSO, Speck, master.

[ \* 154 ]

August 9, 1799.

A case of property. Effect of an attempt of a neutral to cover enemy's property, as to goods mixed up with it, &c. &c.<sup>1</sup>  
 Fraudulent destination in colonial trade.<sup>2</sup>

THIS was a case of a ship and cargo taken 13th February, 1799,

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<sup>1</sup> [The Eenrom, 2 C. Rob. 1, note.]

<sup>2</sup> [The Phoenix, 3 C. Rob. 186.]

on an asserted voyage from Cayenne to Hamburg, and claimed for Mr. Beckmann, and Messrs. Ecchardt & Co., of St. Thomas.

#### JUDGMENT.

SIR W. SCOTT. The court has very frequently to lament that its duty often calls upon it to condemn the property of neutral merchants on some strict principle of law. The circumstances of this case most effectually relieve it from such concern, for it is a case that I may safely pronounce to be poisoned with fraud in every vein; and the court feels a satisfaction in executing that duty which it owes to the general interest of mankind, in reprobating and exposing such practices. The truth of this transaction cannot be better described than in the words of one of the letters found on board: — "In short, the most artful tricks that can be devised to elude the inquiries of the English must be put in practice; for they must not discover the real destination to Cayenne." That is the text; and it appears to have been followed up with as much zeal and industry as could possibly be exercised.

The first point that I shall consider is the property of the vessel. On this great doubts arise, by which I mean not arbitrary doubts, but legal and judicial doubts, such as must make a reasonable impression on every one that attends to the evidence of the case. As a

case of simple doubt, it must be a case for further proof. [\* 155] It is an American vessel, under the name of the Lady Walterstorf, (a singular name for an American ship,) said to have been purchased at New York, by Mr. Beckmann, of St. Thomas, in 1797. From whom the purchase was made does not appear; it is nowhere mentioned in the papers; the master knows nothing of it. She might, therefore, have belonged to a French owner, or to one of those locomotive fugitive persons whose character, like Mr. Beckmann's, it may not be very easy to determine. A master is put on board, of a character no less equivocal. He is represented as a Danish subject, but, when at home, always resides at New York. It may be proper, also, to consider the character of the asserted proprietor, Mr. Beckmann, who was the first purchaser, but afterwards transferred a part to Mr. Ecchardt. According to the master's account he resides at Hamburg, but in fact we find him everywhere but at Hamburg; he is at New York, at St. Thomas, at Cayenne, Paris, and Rochelle. There is no evidence mentioning his connection with Hamburg but the deposition of the master, — a person certainly not entitled to entire credit. The papers all describe Beckmann and Ecchardt as *incolæ hujusce insulæ*; that is, St. Thomas. Under this contradictory evidence, therefore, — seeing that in the



course of this transaction he appears at New York, St. Thomas, Cayenne, Rochelle, and Paris, and nowhere else, and that the master describes him as resident at Hamburg, — it would be impossible for me to pronounce him to be a *bona fide* resident merchant of that place; and the least that the court could do would be to require farther explanation of the mercantile situation of this gentleman. As to the other asserted proprietors in this business, their national character is not impeached; but I cannot go the [ \* 156 ] length contended for, and consider them as persons so pure and purged of all possible *mala fides* as has been represented. When I find them appearing before the magistrate at St. Thomas, 1st August, 1797, and making oath “that the destination of that voyage was to Surinam, and from thence to Hamburg,” although I am satisfied in my own mind that there never was the least intention of going to Surinam, I cannot think them entitled to all the panegyric that has been bestowed upon them. I have said that there was no intention of going to Surinam, and, for proof of this, I refer to the master’s answer to the seventh interrogatory, where he says, — “That he went from New York to St. Thomas, and there took in a cargo for Surinam, but was, in the course of the voyage, forced to go into Cayenne by a mutiny of his crew.” But I observe that, when they are there, the cargo is immediately sold, and by Mr. Beckmann, the owner, who was on board. This circumstance is, in my opinion, sufficient to prove the falsehood of the asserted destination to Surinam. Why a crew going to Surinam should choose to force their way into Cayenne is not very easy to conjecture. It is near Surinam, a most unhealthy place, and, what is not in itself very attractive without some special reason to neutrals, a very unsettled French colony at this time. But suppose an owner carried in by mutiny and force; the first step would naturally have been for such an owner to have proceeded in some way against such delinquents. He does nothing of the kind, but immediately sets about selling the cargo with all possible composure and activity; and acts, throughout, like a man extremely willing to submit to the force put upon him. \* There is too much reason to conclude that [ \* 157 ] the whole was a matter of the same contrivance that appears to have been attempted to a like effect in the subsequent voyage.<sup>1</sup>

As to the papers, they are in no degree authenticated; the pass is not that described by the master. He says, “It was obtained on his

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<sup>1</sup> In the last outward voyage to Cayenne. The master, on seventh interrogatory.

oath." This instrument does not so describe itself, but appears to have been granted on the oaths of Eochardt and Beckmann, therefore the papers are by no means duly verified by the master; and if they were, it would not be too much to say that his evidence could not give effectual aid to any transaction whatever. I need not travel back far to find that he has been guilty of direct perjury in his former management of the concerns of this ship, and as for the late merit claimed for him from his disclosure, I can give him little credit for it considering the circumstances under which he has appeared; when we find him stained with perjury in August, 1798, to give him credit for pure and unblown integrity in January, 1799, is neither a moral or legal way of estimating the credit of men. The master being discredited, and the papers unverified, it would of course be a case of further proof at the best, with respect to the ship, considered upon the evidence applying merely to itself and independently of any connection with the cargo. But I do not think that the court is limited to this view of the transaction only without considering the circumstances relating to the cargo, as they stand connected with the character and employment of the vessel, because the use and [ \* 158 ] occupation of a vessel are \*extremely proper to be considered; for if the whole of the *res gesta* shows the parties to have been habitually and, throughout this transaction, employing the ship in fraudulent purposes, it must very materially affect their claim to farther proof respecting the property of the ship. It has been said that false papers will not, by the law of this court, necessarily lead to condemnation if the proof of property is clear; and that papers, false as to the destination, will not stand in the way of restitution under the practice of the admiralty of this country. It has been said also, and truly, that the evidence respecting the cargo does not generally affect the ship, as it may frequently happen that the owners of the cargo will, from lust of gain, put on board false papers without the knowledge or privity of the owners of the ship. But it is a very different case when the ship and cargo belong to the same persons; and although I will not say that false papers would, even in such a case, necessarily lead to condemnation of the ship, yet when the first case is only a case of farther proof, false papers put on board by the common owners of both ship and cargo cannot but very materially affect their claim to that indulgence. What then have been the habits of this vessel? As to her employment it will not be contended that it has not been fraudulent throughout. In the first part of the history of this ship we find her sailing from St. Thomas ostensibly to Surinam, but putting into Cayenne with Mr. Beckmann, her principal owner, on board; and, as it appears evidently, I think, from

other circumstances, by his concurrence and contrivance. From Cayenne she sails again, on a pretended destination to Hamburg, but puts into Rochelle, with \*Mr. Beckmann still [ \*159 ] on board, and the cargo is there disposed of.

That Mr. Beckmann went to Hamburg, or held any intercourse with that place, nowhere appears, except in the evidence of the master. That he went to Paris at this time is certain, and he appears to have entered into a charter-party for this vessel to go to Cayenne and back, making oath that she was going to St. Thomas. By what salvos it is that persons of any education, or of any credit, make such oaths, I am yet to learn; but the fact is, that they swear the destination was to St. Thomas, at the same time that the vessel is sailing under a contract to go to Cayenne and back again to France. Instructions are put on board also, as artfully drawn, for the purposes of fraud, as it is possible for man to conceive. Be a man's talent or genius for falsehood what it may, I defy him to fabricate a fraud more ingeniously than it is done in these instructions. That they were not without effect is evident, as the ship was stopped by an English frigate and released. So documented, the ship goes again to Cayenne under a pretended force from the French government; the fact being, that it was her true and original destination; the outward cargo is there sold, and a return cargo taken in, documented in the bill of lading as the property of Beckmann and Ecchardt, though it appears from concealed papers, that have been since produced, that the greatest part belongs to a number of French merchants, and that only a small part is, in fact, the property of these persons. Now it is said that all the papers are to be taken together, and it is insisted on, as a reasonable rule, that in cases where some papers \*are produced at first, and others kept back, you are to [ \*160 ] suppose the papers not produced, to state the true and exact measure of interest. I allow that all the papers are to be taken together, but I cannot go so far as to admit that concealed papers are to be taken as necessarily containing the truth; because if such a rule was established as a principle of this court, it would let in an infinity of fraud and make it the easiest thing in the world to protect the chief bulk of property in any case by giving up some part upon the pretended disclosures contained in these concealed papers. The more reasonable rule would be, that where there is one set of papers admitted to be false, and another set coming out of the same hands, that the whole is thrown into a state of uncertainty and doubt. It is said that Beckmann was a stranger to this part of the transaction, but I think that cannot be maintained. He knew the manner in which this voyage begun; he was the person sending out the vessel with fraudulent papers, and on a false oath, and that he

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The Hoffnung. 2 C. Rob.

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should not know how the returned cargo was to be conducted, is not very naturally to be conceived. It would require great charity to believe that Ecchardt & Co. were not also privy to the whole design. I have already pointed out some papers which seem to me to connect them very closely with the fraud. But if it were not so, if they were entirely ignorant of the matter, I must adhere to the rule laid down, (without which, the greatest frauds would be easily practiced on the court,) that where persons put their property into the hands of their agents and partner, as the agent is in this case, they must be bound by the consequences of his acts, as to the property so [ \* 161 ] intrusted to him. If they put the vessel into his hands and allow him to employ it as he pleases, whether they are immediately conusant of his practices or not, they are affected with a legal privity, and that will be sufficient to dispose of their interest in her. Looking then to the whole of this transaction I ask, Is this a case that, according to the principles on which this court has proceeded, I can refer to farther proof? I am clearly of opinion that it is not. But I will go farther, and say, that I have no hesitation in delivering my opinion, that if it appeared in evidence to be neutral property in the clearest manner, still, if it was proved that the ship was going from the mother country of the enemy to their colony under false papers and a false mask, and coming back again to the mother country, that she would be subject to confiscation. On every principle of justice the employment of a vessel in this manner, not only to carry but to cover and protect enemy's colonial trade from the just rights of war, is such a gross departure from neutrality, that I should have no hesitation to condemn expressly on this ground; but that is not necessary. The ground on which I condemn is, that gross leaven of fraud which runs through every part of the transaction and contaminates the whole case, even on the neutrality of the property.

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[ \* 162 ]      \* THE HOFFNUNG, Berens, master.

August 20, 1799.

Act 39, G. 3, c. 98, respecting liberation of ships bringing Spanish wool, does not supersede proceeding by captors before the Court of Admiralty on other grounds.  
[A license applies only to British subjects.]<sup>1</sup>

THIS was a case turning principally on the interpretation of an

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<sup>1</sup> [See The Beurse Van Koningsberg, 2 C. Rob. 169, note.]

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*The Hoffnung.* 2 C. Rob.

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act of parliament, 39 Geo. 3, cap. 98, respecting ships importing Spanish wool. Whether the power given to his Majesty's council to release such ships superseded the jurisdiction of the Prize Court, on other grounds of inquiry that might be taken by captors?

The license was dated on the 21st March, 1799, being the date of the notification of the blockade of Holland; but as that was not noticed in the terms of the license it was made a question on the part of the captors, Whether the license to import Spanish wool from Holland was to be taken as exempting them from the blockade? And farther, as to the property, it was submitted, that as it was a ship asserted to have been purchased in Holland, but having no bill of sale on board it was clearly, on that ground, a case of farther proof.

On the other side *Laurence* contended, on the part of the claimant of the ship, That the power of the Court of Admiralty to proceed against this ship was precluded by what had already passed. That she came under the description of vessels whose release was provided for in a special manner by the stat. 39 Geo. 3, cap. 98; that this vessel had obtained her release in a summary manner, under that form, and was, therefore, not now liable to be proceeded against on a question of property, or blockade.

• JUDGMENT.

[ • 163 ]

SIR W. SCOTT. The first thing that I shall do will be to lay out of the case all question of blockade; on the ground that the license is granted on the same day when the notification stated the blockade to commence; for I think I am bound to presume that it was intended the parties should have the full benefit of importing these articles, without molestation from a blockade, which could not be unknown to the great personage under whose authority, and in whose name this license issues.<sup>1</sup> I add farther, that I think this license bears very materially on some other licenses which had been previously granted; for when I see that the blockade was not considered as a ground for withholding these licenses, I am led to suppose that it was not intended to have the effect of suspending the operation of such as had already been granted.

The question of blockade being disposed of, Is there any thing else that puts the case in an unfavorable situation? It is said, that the

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<sup>1</sup> [In the *Orion*, 1 Stew. 497, it was held that a license to an enemy protected him in egress from a port subsequently blockaded; the court thinking that, from the nature of the trade, such was the intension.]

property of the cargo is not proved. On this point it is indubitable that the king may, if he pleases, give an enemy liberty to import. He may, by his prerogative of peace and war, place the whole country of Holland in a state of amity; and, *a fortiori* he may exempt any individual from the operation of a state of war; but I apprehend, that unless there are very express words to this effect to be found in the license, I am to consider its meaning as not going to that extent, but as giving such a liberty only to subjects of this country. It is a license "to British subjects" to import, &c., [ \*164 ] and as I understand it, they are to import on their own \*account.<sup>1</sup> And if it appeared that the importation was on the account of other than British merchants, I should hold, that under the terms of this license, it could not be considered to be a legal importation. I must say, however, that there is nothing in this case that shows the terms of the license were not sufficiently complied with, and, therefore, I restore the cargo.

The question then remains as to the ship, and that question might not be without its effect upon the cargo; for, certainly, a license to import in a neutral vessel would be no license for an importation in an enemy's vessel. At the same time this court could hold that it was sufficient for the protection of the British importer of the cargo, if the ship was visibly, and to all appearance, neutral. A merchant cannot look further. He cannot be supposed to look into the title deeds of the ship; and though this court, by its power of inquiry, might be able to detect enemy's interests lurking therein, still that would not be allowed to affect the cargo, unless the importer, or his agent, could be directly affected with the knowledge of that fraud.

With respect to the ship, one question arises on an act of parliament, 39 Geo. 3, cap. 98. It is a ship bringing commodities for the manufactures of this country; and certainly the court would not, as it has been said, be disposed to press any thing more strictly against a ship in such a service, than it is bound to do. At the same time, a

ship coming into our port as a neutral vessel, but being [ \*165 ] really not so, \*cannot be said to come under the faith of a license; she can in no degree be compared with the cases mentioned of ships coming under a flag of truce. They come in a known and avowed character; there is no concealment or abuse. But if an enemy's ship comes under a license granted only in terms to neutral vessels, she abuses the license, and must be considered not as coming on the faith of this government, but as endeavoring, fraudulently, to take the benefit of a license to which she is not entitled.

<sup>1</sup> In The Beurse Van Koningsberg, February 27, 1800, (introduced as the next case,) this question came more immediately before the court.

Before the passing of the act in question, it had been usual to encourage the supply of this article of great necessity, by granting licenses to "A. B., or his agent, or bearer of the bill of lading, to import Spanish wool in neutral bottoms." But it is said that this mode was attended with inconvenience; and therefore, on application to the legislature, this act was passed.

On the first clause nothing particular arises; and I may, perhaps, be going out of my way to say any thing upon it. At the same time, it may be attended with convenience to merchants to know, that it appears to this court to be exposed to some degree of doubt and difficulty. There can be no disposition in this court, (as there certainly ought not to be,) to pass light observations on acts of parliament. At the same time, it is known that particular acts of parliament are not always modelled and drawn up by persons sufficiently acquainted with, or attentive to, the state of the general law to which the new regulations are to apply. It rather appears to me, that the persons procuring this act have not entirely secured themselves from an inconvenience of this nature. The words of the act are, "Whereas by an act, passed in the thirty-third year of the [ \* 166 ] reign of his present Majesty, amongst other things, to prevent traitorous correspondence with his Majesty's enemies; and by several subsequent acts, trade and intercourse is prohibited between Great Britain and the countries in hostility with his Majesty, unless such trade and intercourse shall be specially permitted by his Majesty's license and authority; And whereas, for the encouragement of the manufactures of this country, it is expedient to permit the importation of Spanish wool from any place whatever, in ships or vessels belonging to any kingdom or state in amity with his Majesty; Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful to and for any person or persons to import into this kingdom, Spanish wool from any port or place whatever in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with his Majesty; any thing in the said act, passed in the thirty-third year of the reign of his present Majesty, or any other act or acts of parliament to the contrary in any wise notwithstanding."

Now, by this, it appears as if the whole illegality of the trade, and the penalties belonging to it, arose out of those special provisions of the legislature; for the preamble points merely to those acts of parliament, and the *non obstante* in the conclusion, points generally to acts of parliament. Yet it is perfectly well known, that independently of these, or any other acts of parliament, it is unlawful by

[ \* 167 ] the general \*maritime law of this realm, which prohibits such commerce. This clause exempts persons from the penalties of those particular acts ; but if there are other penalties by the common maritime law, which considers that trade as illegal, and punishes it by confiscation of the goods, it will not be easy to point out how this clause takes off that illegality and the penalties attached to it ; or at least it must be admitted that it leaves some question of interpretation in a case where no such question nor the danger of any such question, ought to exist. The question more immediately before the court arises on the second clause.

“ II. And be it further enacted, That in case any ship or vessel having on board any Spanish wool, has been or may be detained, and it shall appear to the satisfaction of the lords of his Majesty's council that his Majesty's license was granted for the importation of such Spanish wool before such detention, it shall and may be lawful for the said lords of his Majesty's council, and they are hereby authorized and required to order and direct the immediate restoration of every such ship or vessel, and all such Spanish wool, under the aforesaid circumstances, to the respective owner or owners, or proprietor or proprietors thereof.”

Now that it should be the intention of the legislature to say this, that by putting on board any ship whatever a bale or two of Spanish goods, that ship should be protected to any extent, can hardly be maintained, unless there were very clear and express words to that effect ; for by such an interpretation the whole navigation of the enemy might be protected. That the Court of Admiralty [ \* 168 ] should be obliged to \*shut its eyes to every circumstance respecting a vessel, except its having a bale of Spanish wool on board, seems not a very natural intention on the part of the legislature ; more especially when we look to the terms of the first clause, which describes the indulgence to be meant only for the ships of persons at amity ; and the two clauses must, I think, by fair construction be taken together.

If there is a captor before the court who takes upon himself to aver that a vessel is not neutral property, I cannot think that I am not at liberty to examine that question ; and I am more strengthened in this opinion when I look back to the words of the act, and construe it by the order of council. The order of council declares the importation to be according to license ; the license is for “ importation in neutral ships,” and the act directs “ the immediate restoration of every such ship under the aforesaid circumstances. If ships are not neutral ships, then they are not under the aforesaid circumstances. The order only declares the license to have been granted, and directs the



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The Beurse Van Koningsberg. 2 C. Rob.

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restitution, as far as the Spanish wool was concerned, leaving all other questions still open, and the neutrality of the ship remains still examinable by this court, at the application of the captor. If the party is dissatisfied with my interpretation, he will recollect that the Courts of Common Law are the most effectual expositors of acts of parliament.

Adverting then to the facts of the case, the master is ignorant of the built of the vessel, but she appears to have been purchased in Amsterdam by Mr. Hillary Bauman, a great purchaser of ships, who handed it over almost immediately to his son. [ \* 169 ] She continued under the former master in the Dutch trade. I think it is not too much to say, that there is that reasonable suspicion of the continuance of Dutch interests in this vessel which calls for farther elucidation.

On 26th June, 1800. On production of farther proof, the COURT said:— The doubts are not absolutely cleared away; but considering the smallness of the value, and the manner in which the ship first came into this port, under a license, I shall restore it.

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THE BEURSE VAN KONINGSBERG, Shemills, master.

February 27, 1800.

Terms of the license respecting Spanish wool to A. B., importer and holder of his bills of lading, not meant to exempt a claimant under license from negating enemy's interest in his claim.<sup>1</sup>

THIS was a case on the claim of Mr. Robarts, a British merchant, for a quantity of Spanish wool imported under a license from Spain. An objection being taken by the *King's Advocate*, that the claim did not express the property of the claimant, nor negative enemy's interest, it was said, for the claim, that it was in the same form as many other claims in which restitution had been obtained.

COURT. Perhaps the claimant will not object to amend his claim.

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<sup>1</sup> [The Hoffnung, 2 C. Rob. 162; The Josephine, 1 Acton, 313; La Cousine Marianne, 1 Edw. 346; The Aurora, 4 C. Rob. 218; 1 Maule & Selw. 217; Ibid. 220; 3 Ibid. 337; 5 Ibid. 95; 3 Taunt. 546; Ibid. 554; 4 Ibid. 4; 5 Ibid. 730; 15 East, 477; Ibid. 525; Ibid. 522; 4 Camb. 339.]

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This not being acceded to, the cause came to be argued.

For the captors, the *King's Advocate*. In this case the articles in question are claimed for Mr. Robarts, but the bills of lading [\*170] express accounts and \*risk of merchants in Altona. It is a claim<sup>1</sup> perfectly novel in its form; as it not only does not assert British property, but as it does not even assert neutral property, or negative the interest of an enemy. It is said that Mr. Robarts claims under the terms of the license, "as importer and holder of the bills of lading," and that he is entitled to restitution in that character. The whole question will depend, then, on the terms of the act, in conjunction with the license; and if they have not been properly pursued, the goods imported under it, in trade with the enemy, will be subject to confiscation. At any rate, the captors will be entitled to their expenses, as the license [\*171] \*was not on board, consequently as they were under the necessity of bringing the case to adjudication. The enacting words of the act allowing the importation of Spanish wool are: — "That it shall be lawful for any person or persons to import into these kingdoms Spanish wool from any port or place whatever in foreign parts, and the Lords of the Council are to direct restoration to the respective owners or proprietors." It must be contended, to support a claim in the present form, that it was the intention of this act to extend the importation to all persons whatever, friends or enemies, — a position that will hardly be maintained. The form of the release<sup>2</sup> reciting the act and the license proves, also, that it was

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<sup>1</sup> The claim was in these words: — "The Claim A. Rob. &c., on behalf of himself, as the importer and holder of the bills of lading for one hundred and forty bags, &c., laden on board the ship, being a neutral ship, under the authority of his Majesty's license, and on behalf of himself and others the owners and proprietors, at the time the said ship was seized by, &c.; and for the said one hundred and forty bags of Spanish wool, as being laden on board a neutral ship, for the purpose of being imported into this kingdom by the authority of the aforesaid license, and by an order of his Majesty's most honorable Privy Council, bearing date 20th December now last past, directed to be liberated, it having been made to appear to their lordships' satisfaction that his Majesty's license was granted for the importation thereof previous to the detention of the said ship; and for all costs," &c. The affidavit of Mr. Robarts, annexed to the claim, stated the circumstance of the license, the capture, and order of restitution from the Privy Council, and concludes: — "And this deponent lastly saith that he is duly authorized to make the claim hereunto annexed for the said goods, on behalf of the owners and proprietors thereof; and that the same is a just and true claim, and that he shall be able to make due proof and specification thereof, as he verily believes." For the usual form of claim, see the Appendix.

<sup>2</sup> See Appendix. [No. VI.]

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The Beurse Van Koningsberg. 2 C. Rob.

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intended only to protect the importation of Spanish wool being British property.

It recites the act requiring the importation to be by license, and directing the restoration to be to the proprietor or proprietors. It then states Mr. Robarts to have caused to be put on board these articles for the purpose of importing under the authority of the license; and declares the release to be under the powers and authority vested in the Lords of his Majesty's Council by the said act, referring clearly to that clause which directs them to restore to the respective owners and proprietors.

It appears also, by the subsequent order of council,<sup>1</sup> which may be taken as explanatory of the act, that there was no intention of extending it to other than British subjects. This is an order of the 19th February, 1800, which recites the act of parliament 39 Geo. 3, c. 98, and states:—"Whereas doubts have arisen whether, according to the true construction of the said act, his Majesty's subjects are thereby authorized," &c., "and goes on to direct [ \* 172 ] "that it shall be lawful for any of his Majesty's subjects to purchase and import into this kingdom Spanish wool, notwithstanding the purchase and importation thereof may be deemed a trading with his Majesty's enemies, and notwithstanding the same might be liable to capture as the property of his Majesty's subjects trading with the enemy, in case the order had not been made." Mr. Robarts claims as "importer and holder of the bill of lading." If it is meant that he is the proprietor, there can be no objection to restore to him what he claims in that character; but it is submitted that this form of words is not sufficient, the obvious meaning of them, in the license, being only to extend the right of importing under it from Mr. Robarts, as the original proprietor, to any person to whom he might have indorsed the bills of lading as a transfer of his original interest.

For the claim, *Arnold* and *Laurence*. It is not necessary to go so far as it has been attempted to push our argument on the other side, or to maintain that the words of the license would extend to authorize an enemy merchant to come before the court and claim this property as duly imported under such license. It is sufficient to show that there is nothing in the form of words particularly confining the property to Mr. Robarts, or requiring him to claim under any specific description of property. The terms of the license direct the British

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<sup>1</sup> See Appendix. [No. VII.]

cruisers "to permit A. B., or the bearer of his bill of lading, to import." It empowers him to make the importation by any means, either by himself or his agents. The words of the explanatory order are, in like manner, as broad as possible,— "purchased or [ \* 173 ] caused to be brought into this \* kingdom," or "cause to be imported." In conformity to these terms, it is submitted that Mr. Robarts stands before the court in the character marked out by the license, as the importer and holder of the bills of lading, and that, as such, he is enabled to receive restitution, as it has been obtained before in other cases under a similar form.

COURT. The only point on which I shall decide at present is, that the captor must be entitled to his expenses. Whoever has heard this case discussed must see that the captors were obliged to bring it to adjudication. I am sorry that it should be attended with additional expense to the merchants; but if they entitle themselves to extraordinary privileges they must know that they cannot enjoy the privileges of peace in time of war without taking some disadvantages along with them. The difficulty arises on the terms of the license; it is a very important question, and I shall not decide it without further deliberation.

On the 7th March the COURT said — Since the argument in this case, on the result of which I entertained no doubt in my own mind, I thought it not an unreasonable caution, on a matter so extensively connected with the commerce of the country, to inform myself whether it was at all within the intention of his Majesty's Council, in the grant of these licenses, to permit the trade in the unlimited manner contended for by the claimants; and I find no such indulgence was intended to be given, or was deemed possible to be given, under this act of parliament. I am, therefore, under the necessity of [ \* 174 ] assigning Mr. Robarts to amend \* his claim, and certify that the goods are not the property of an enemy.<sup>1</sup>

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<sup>1</sup> The editor has been informed that, upon an application afterwards made by the merchants for a further extension of the trade with the enemy, and a full hearing thereon before the council, it was deemed unadvisable to comply with the prayer of their petition.

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The Haabet. 2 C. Rob.

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THE HAABET, Vette, master.<sup>1</sup>

August 30, 1800.

Report of the registrar and merchants, disallowing insurance which had not actually been made, affirmed.

[Of the right of preëmption.]<sup>2</sup>

THIS was a case arising on an objection to a report of the registrar and merchants respecting the allowance of insurance, as part of the price of a cargo of wheat, going from Altona to Cadiz, but seized and brought into this country, and bought by government. The demand of the claimant, Mr. Peschier of Copenhagen, had been disallowed in the report, on the ground that the insurance had not actually been made.

For the petition, *Lawrence and Swabey*. This is a case of a cargo of corn, purchased by government, under a general agreement as to value, of allowing the invoice price, and ten per cent. profit. The insurance has been charged to this account, but the registrar and merchants have refused to admit it because the insurance has not been actually made; that is, in effect, they have determined that owners are not at liberty to be their own insurers, by taking the risk on themselves. It will appear that this is an opinion by no means confirmed by the general opinion of the most respectable mercantile persons in this city.

[A declaration of a contrary opinion was here offered to be introduced, signed by several merchants. And it was said that this had been offered, agreeably to practice, \*to allow [ \* 175 ] persons to state their case in writing, before the registrar and merchants at the time of forming their report. On objections to the admission of such evidence, it was rejected by the court, with observations occurring the judgment.]

*Counsel*. If the opinion of these most respectable merchants is not to be received as evidence it will not be unfair to object, on our part, against the competency of the merchants signing the report, to determine a question of this sort as judges. The authority which they

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<sup>1</sup> [Affirmed on appeal, August 10th, 1803.]

<sup>2</sup> [The *Jonge Jan*, 1 Dod. 458; The *Maria*, 1 C. Rob. 373; The *Sarah Christina*, 1 C. Rob. 341. The right of preëmption was exercised in the following cases:—*Hay & Marriott*, 142, 148, 169, 176, 217, 246, 250, 267, 270, 272, 287.]

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The Haabet. 2 C. Rob.

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may exercise in matters of freight and expenses, in conjunction with the registrar, can give them no authority to speak as merchants on a point in which it is submitted the greatest deference is due to the more general opinion of the mercantile world. It may be said, perhaps, that there are some cases of costs and damages in which this charge has not been allowed, as between claimant and captor; but they will not be any authority for this case. This is a case between his Majesty's government and neutral nations on the right of purchasing goods bordering on the nature of contraband, and bound to ports of the enemy. It is a right, in its nature, of much delicacy, and one that has not been sanctioned by continued use. If it is a right which it is not thought advisable to give up on the part of this government; it must be allowed on all sides to be a right, which is to be exercised with great fairness, and respecting which the terms of payment are to be interpreted with the most liberal construction. The agreement is, that allowance shall be made for the original price, with a fair reasonable profit. At the beginning of this war, when the agreement was made, the same terms were adopted that had been settled in the last war; and all that was required was, [ \* 176 ] that the neutral \*merchants should prove that the premium charged was a fair one, in proportion to the ordinary sea risk, and that it had actually been charged in the invoice, previous to the capture, with a view to the general market price. It was not required that the policy of insurance should be produced. It was reasonably conceived, therefore, to be immaterial, whether the merchant insured with others, or whether, as large traders frequently do, he might choose to stand his own insurer. This was the general understanding, and it is also warrantable to assert, that it was so understood, on the authority of the navy board, (which was then empowered to settle these matters); and that it was not usual in the practice of the last war to require the policy of insurance to be produced. That being the case, on what principle can it be said that a merchant might not take the risk on himself? and that although no formal contract had taken place, he might not charge on his cargo the usual rate of insurance. It would be to prevent persons from conducting their own business in their own manner, and make a very good monopoly for public insurers. A paper has been invoked from *The Fortuna*,<sup>1</sup> a case similar to the present, in which Mr. Peschier was the claimant of the cargo, and in which a general average had been incurred before capture. This has been disallowed also by the

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<sup>1</sup> *Fortuna*, Jebson, Adm. 1st October, 1796.

registrar and merchants in their report on that ship, and, therefore, it is a loss that he, standing as his own insurer, must bear himself. Supposing it to have happened in this very case, would it not be the most manifest hardship to oblige him to stand to the loss of one part, and at the same time to prohibit him from making the charge of the premium of insurance? If the charge had not been made in the invoice, there might have been some reason for [ \* 177 ] resisting the payment, on the ground that as every merchant must be supposed to take some means of indemnifying himself, he might be conceived to have included it generally under some other article. In this case there was no invoice from the shipper, only a correct account. He could not know what the proprietor would do; but, on receiving his account the proprietor sent off, before the capture, a full and complete invoice containing all charges, and, among them, insurance and a fair interest for his money. It was said before the registrar and merchants, that to allow insurance would be to grant insurance against English cruisers; but the rate of insurance in this case may be shown to be at the rate of the sea risk only, and, therefore, that objection does not apply. It is apprehended that, in many respects, the charge of insurance and freight stand on the same ground. As to freight, capture is considered as delivery, in such a manner as to entitle the neutral vessel to her freight. Suppose a cargo of this nature to belong to the owner of the ship, it could not be denied that he would be entitled to his freight; and not only on charges actually paid, for then it would be confined to the wages of seamen and other charges, but to the full extent of the fair profits of the voyage. The demand of insurance is still stronger, for that is not a demand of profit so much as of the price for risk, which the merchant had fairly taken on himself. On these grounds, and recurring to the practice of the last war, in which the officers of government who settled these things, allowed this practice without calling for the policy of insurance; and recollecting also that at the beginning of this war, the same understanding prevailed, it is [ \* 178 ] submitted, that the registrar and the merchants had no right to alter this practice, and say, we consider it otherwise; and, therefore, that their report ought not to be confirmed.

Against the demand the *King's Advocate*, and the *Advocate of the Admiralty*. The question is, Whether the claimant is to be allowed to reckon amongst his charges and expenses, a charge for insurance which he has never made? The report which is now before the court has refused this demand; and notwithstanding the observations made on the report, it is apprehended, that the *prima facie* pre-

sumption will lie strongly in favor of those to whom the court has referred the question; it being a board of a mixed nature, consisting of the registrar, who is qualified to consider the law and practice of the court, and of merchants, selected by the court, to give information on matters of mercantile use and custom. The opinion of such a board will, therefore, stand in point of authority on very different grounds from the mere opinions of any private merchants, however respectable they may be. It is insinuated that there has been an agreement in this matter; if so, it would be decisive; but that has not been shown, and all that appears is, that the navy board in settling such accounts in the last war, did not demand the policy to be produced. So, in the beginning of this war also, before the registrar and merchants; but this might proceed only on a supposition that the insurance had been paid; as when it is found charged in the invoice, the first impression would naturally be that it has been paid. But

immediately that it was discovered that the insurance had [ \* 179 ] not \*actually been paid, it was disallowed. That this case

is to be more favorably considered on behalf of the claimant, than cases of costs and damages, where a wrong is supposed to have been committed against him by the captor, cannot reasonably be contended, for there the captor being adjudged guilty of a tort, would be liable to make the fullest compensation. But this is a case arising out of a justifiable act, out of the right of preëmption, which has always been asserted, and is allowed to be justly exercised by all belligerent nations. It has, accordingly, been reduced to a matter of agreement, what the compensation shall be — an allowance of all payments, and a reasonable profit. All that this country is bound to do as to the price, is to reinstate the claimant, to repay the party what he has disbursed. How can this take place for sums which have never been expended? The court will not look to the state of profits, nor to the risk that may be calculated at the port of delivery, neither will it compare this demand of insurance, which is optional, and depending on various circumstances, with the allowance of freight which is, in its nature, a thing always attending the cargo. The risk of loss in this case has never been incurred. The payment has never been made, and, therefore, there is nothing on which the demand of the claimant can be sustained.

#### JUDGMENT.

SIR W. SCOTT. This is a question on a report of the registrar and merchants respecting an allowance of insurance on a cargo of corn, seized and brought into this country. The cargo was decreed to be restored, and the registrar and merchants were directed



\*to make a report on the value due to the claimant; such [ \*180 ] reports are in their nature partly legal and partly mercantile. It is a report proceeding from persons qualified, in both these respects, to form a sound judgment on the subject before them; one of them being, from his connection with courts of justice, supposed capable of forming his own opinion, and of assisting his associates on all questions of law, in the first instance subject to the inspection and correction of the court, whilst the other part of this domestic forum, as I may call it, consists of persons acquainted with trade, and exercising their judgment on matters relative to commerce. It is from the report of a commission so constituted, that the question is now brought before the court on a subject partly legal and partly mercantile. Another report has been brought before me to day from other persons, (private merchants,) of whom it is impossible for me to speak with too much respect, attending either to the extent of their information, or to their known probity and honor; but they have, I think, a little mistaken their function in delivering their judgment upon the question proposed to them. They are persons of great experience in mercantile affairs, and from whom the court, upon subjects purely of that kind, would gladly receive any information which they could conveniently impart. If the court had desired to know, Whether it was the practice of merchants, in the ordinary course of commerce, usually to charge and allow insurance, though the insurance has never actually been made? Their answer to such a question would have satisfied its conscience upon a matter of usage best known to themselves, and requiring nothing \*on [ \*181 ] their part but a fair communication of their own experience and practice. But the question on which an opinion has here been obtained from them is this, "Whether if a neutral cargo is seized by a belligerent during war, the belligerent is in all cases bound in compensation for this cargo, (supposing it not liable to confiscation,) to pay such an insurance, no insurance having been paid by the shipper?" That is not a question merely of the law merchant, it is a question which may embrace other considerations, and those belonging to the general law of nations; in truth, it is the very question in the cause now submitted to my decision, and if I regard this opinion so given as an authority, there is an end of any duty which I have to perform, for here is an actual decision upon the whole law and fact of the present case. They will acquit me, I am sure, of any incivility, when I venture to say, that the labor of giving such a decision is not legally imposed upon them; and, therefore, that this private report so introduced, does not come with any just credentials of authority.

The question is, Whether there is any reasonable ground for me to

pronounce that the registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other. I am not clear that this is a necessary consequence, for it is surely no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of preëmption, that it is to receive a price calculated exactly in the same manner, and amount-  
 [\* 182] ing precisely to the same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, *Commeatus*, or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times, of holding such cargoes subject only to a right of preëmption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven, by his necessities, to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable  
 [\* 183] indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms. But certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all

loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorized exercises of the rights of war.

Two or three considerations have been urged, which may, with all propriety, be dismissed. One is, that it was understood between the king's government and the parties, that this charge should be allowed. Certainly if it were made out by any credible proof, that the faith of government had been in the slightest manner pledged to such an understanding, there is no principle which this court would hold more sacred, than that the faith of government should be held inviolate in transactions of this kind; but no sort of proof is offered of this, and the fact has in no way come to my knowledge. It is said, likewise, that in the cases of this kind which occurred last war, and which were then settled by the navy board, the charge of insurance was allowed, but the policy of insurance was never called for. How this practice came to prevail there, whether under a notion that the insurances had been really made whenever they were charged, whether under any order of government, or how otherwise, I am not informed. The persons who had to settle those [\* 184] accounts were not mercantile men, and might be led by the charge to suppose that it had actually been incurred. Under whatever circumstances such a practice grew up, if it did obtain, it is no binding rule upon the registrar and merchants here. It might be simple mistake, and at best, it is no deciding authority.

I have already said that the expected payment at the port of delivery, is not the necessary measure of compensation at the port of the belligerent. It is not so with reference to any constituent of price. With respect to insurance considered as such, it would be peculiarly improper. It is reasonably to be charged at the port of delivery, although it has never been paid, because the merchant has stood his own risk, and has purchased the insurance at the expense of his own danger. But is that the case where the voyage has been interrupted almost in its commencement, where the cargo has been carried into a neighboring port? In the present case, the voyage was from Altona to Cadiz, from the north to the south of Europe, and the cargo is seized upon its entrance into the British Channel very soon after quitting its port. Most of the cargoes taken have a similar destination, and are taken under similar circumstances. What pretence is there to say that all risks of the voyage have been incurred? The utmost that could be claimed is an insurance *pro rata itineris peracti*, amounting to a very small proportion of the whole, hardly deserving a particular consideration. As to what is said, that in the case of capture of ships, you allow the full freight of the whole voyage; that allowance is made on another [\* 185]

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The Immanuel. 2 C. Rob.

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account; you take the ship in that case on account, not of itself, but of its cargo. You interrupt its occupation which was legal and innocent, and it is therefore not unjust to allow it the benefit of its original contract, which you alone have prevented from being carried into execution. Very different is the consideration of risk respecting a cargo which has never been incurred, and of a payment which is due only on the event of that risk having been actually incurred, no contract subsisting, and the cargo being, in its own nature, liable to this species of interception.

Upon the whole, I see no sufficient reason to pronounce that the registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance. They have allowed what, upon their own experience, they pronounce to be a reasonable indemnification and profit, and I do not understand that the sufficiency of this indemnification and profit is impeached, on any other ground, than that an insurance would have been added in the ordinary course of a mercantile account, if the cargo had reached its intended destination. Being of opinion that the ordinary terms of a mercantile account, to be settled on the completion of the voyage, do not furnish, (all circumstances being duly weighed,) the necessary or just measure of value to be applied in transactions of this kind, I do not find myself enabled to sustain the objection. If, as it has been repeatedly urged, an understanding to a different effect has subsisted between the king's government and the parties, there can be no doubt that on [ \* 186 ] their resort to a superior tribunal, better acquainted with any communications that may have passed upon the subject, they will have the full benefit of any such engagement.

Report confirmed.

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THE IMMANUEL, Eysenberg, master.

November 7, 1799.

Colonial trade. Principle of war, 1756. Relaxations not to be extended by construction. Voyage from a French port to St. Domingo illegal.<sup>1</sup> [Cargo condemned, ship restored.<sup>2</sup>] [In August, 1799, St. Domingo was a French colony.]<sup>3</sup> [Semble, that after the part of a cargo that is contraband is discharged the rest is not affected by it.]

THIS was the case of an asserted Hamburg ship taken 14th August,

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<sup>1</sup> [The Happy Couple, 1 Stew. 65.]

<sup>2</sup> [The ship was condemned in The Jonge, 3 C. Rob. 232, n.]

<sup>3</sup> [The Manilla, 1 Edw. 1; The Pelican, ib. App. D; Johnson v. Greaves, 2 Taunt. 344.]

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The Immanuel 2 C. Rob.

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1799, on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bourdeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and 2dly, supposing it to be neutral property, Whether a trade from the mother country of France, to St. Domingo, a French colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation? It was denied that St. Domingo was to be considered in its present state as a French colony. After various observations on these points, farther proof was directed to be made of the property; and permission was given to both parties to produce information as to the state and condition of St. Domingo at that time.

On the 5th of August, 1800, the cause was heard on farther proof.

For the captors, *King's Advocate* and *Laurence*. The proofs of property that have been brought forward, seem not to be exposed to much objection, and therefore allowing it to be neutral property, the question remains only as to the effect of the trade in \* which it has been engaged. Whether St. Domingo is [ \* 187 ] not to be taken as a French colony? And taking it so to be, Whether property so engaged in trade, between the mother country and her colony, is not, under the established principles of this country, subject to condemnation? That St. Domingo is to be considered as a French colony, sufficiently appears from a variety of circumstances, some of them arising in this very cause; besides the general professions of Toussaint, and the continual communications that are passing between that colony and France, we find in this cause an exemption of duties, in respect to the importation of its produce into France, and a general understanding on the part of Mr. Jennish's correspondent at Bourdeaux, that the French laws were still in force there. Considering besides, that no proof which the court can receive, has been produced on the other side, the fact may be assumed without farther argument, that St. Domingo was a French colony, and that sufficient ground is laid for the operation of the principle of law, which has always been applied to such cases. As to the general principle of law, it has so often been a *vexata questio* in this court, that it will not be necessary to go at length into all the details of history and reasoning by which it is supported. It will be sufficient to advert to the principles of the war of 1756, when this matter was fully settled on principles that have never yet been abandoned, notwithstanding that they may have undergone temporary relaxations; — as in the last war, owing to the fal-

lacious professions of the French government, as to the changes of their colonial system. It is notorious that these professions [ \* 188 ] proved untrue; the \* former principle was reëstablished, and has ever since been taken to be in full force, as far as it is not relaxed by the orders of council that have issued this war.

The first orders of 1793 contained no relaxation whatever. In January, 1794, fresh instructions issued, directing the bringing in of West India produce coming to Europe, being a relaxation as to the intercourse of America with the West India markets; a change thought reasonable from the particular situation of that country, and the treaties that had been made with it, but not operating as any abandonment of the general principle, as it respected the colonial system of Europe. Afterwards, a farther relaxation took place, 25th January, 1798, as to the allowance of bringing the produce of the West India islands to Europe, but only to the ports of this country, or to some port of the country to which the neutral merchant belonged. This is the extent of the relaxations that have passed. They have not gone so far as to authorize a commerce between the colony and the mother country; and by parity of reasoning there can be no pretence to say, there has been any relaxation, as to the outward trade, from the mother country of the belligerent to the colony. In point of principle there can be no distinction made. There is the same support and maintenance of their revenues by payment of duties, the same employment of the experience and industry of French merchants in assorting the cargo, and the same return of profits to them. On the contrary, the injury to the other belligerent is, in some respects, greater, as it furnishes a supply of war stores, as appears by many of the articles of this cargo, hemp, flax, iron, bricks.

It is, besides, a general consequence of these outward [ \* 189 ] \* speculations, that they bring a return of importation of colonial produce into France; as it appears in this case that many neutral ships had gone from Bourdeaux to St. Domingo, which had found their way back to Bourdeaux, although the return of this particular vessel is represented to have been destined for Hamburg. On these grounds it is submitted, that this is an illegal trade, subjecting the property engaged in it to condemnation.

For the claimant, *Arnold and Sewell*. The particulars of this case are, that it was a speculation, beginning at Hamburg, to send certain goods to the market of St. Domingo, with a liberty of touching at Bourdeaux, where some of the goods were to be landed and others taken in for St. Domingo. In the original scheme of the voyage the bricks and iron pots were to have been carried on to St. Domingo; but it being found at Bourdeaux, that some difficulties were likely to

arise at the custom-house, on clearing out such articles, and as it was apprehended that similar difficulties might arise at St. Domingo, they were landed at Bourdeaux, to be sent back to Hamburg, and other articles of the same kind, but about which the same difficulties were not likely to arise, were put on board. The hemp, about which some argument was at first attempted to be raised, was not on board at the time of capture, and therefore it is conceived that may be laid out of the case. The principal question arises on the legality of going on a voyage of this description, from a port of France to a French colony. In respect to the state of St. Domingo, it cannot be denied, that the representations of the state of the island were numerous and opposite, clearly showing \* that the island [ \* 190 ] was at least in a very unsettled state, and affording a just cause of impression on the mind of Mr. Jennish, to suppose it was no longer a French colony. There is at least a fair ground for the inducement, under which Mr. Jennish states himself to have acted, "in engaging in this trade, principally owing to the unsettled state of the island." It being shown that there was sufficient to justify this impression on the part of Mr. Jennish, it may be better to address the argument to the general question, allowing, for argument's sake, that St. Domingo was at this time a French colony.

It is true that the general colonial law of Europe has created a monopoly, from which other countries are generally precluded; at the same time laws respecting colonies, and laws respecting trade in general, have always undergone some change and relaxation after the breaking out of hostilities. It is necessary that it should be so, with regard to the rights of neutral nations; because, as war cannot be carried on between the principal powers of Europe, in such a manner as to confine the effects of it to themselves alone, it follows that there must be some changes and variation in the trade of Europe; and it cannot be said that neutrals may not take the benefit of any advantages that may offer from these changes; because, if so, it would lead to a total destruction of neutral trade. If they were to suffer the obstructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce. Such a position, therefore, cannot be maintained, that they may not avail themselves of what is beneficial in these changes, in lieu of what they must \* necessarily suffer, in other parts of their trade, [ \* 191 ] in time of war. It is not meant that they should be entirely set at liberty from all the restrictions of peace, — that would be going too far. But that, as there has been a regular course of relaxations, as well in our navigation laws as in the colonial trade, in

admitting importations and exportations not allowed in time of peace, it seems not to be too much to say, that if they have been regularly relaxed in former wars, neutral merchants may think themselves at liberty to engage in it, in any ensuing war, with impunity; and it does justify a presumption, that, as a belligerent country allows a change in its own system as necessary, and invites neutrals to trade in its colonies under relaxations, so it would allow them to trade in the same manner, with the colonies of the enemy. It may be said that the strict principle of war is, to do all possible mischief to your enemy, and destroy his resources and trade, as much as you can. This may be true in theory, but it must be understood only as the strict theoretic principle, which, in practice, is limited by other considerations, and by rights of other parties. The whole trade of the enemy cannot be destroyed without the greatest injury to neutral nations; therefore this right against the enemy must be limited, in some degree by the rights of neutral trade. If you can find, indeed, a trade wholly and exclusively confined to the enemy, that is the point on which it is lawful for you to strike. That was the rule and the foundation of the principles set up in 1756. The state of the colonies at that time justified it. The system remained entire; and as long as the colo-

nial trade remained an exclusive trade, that was the point on [ \* 192 ] which it was lawful to strike; \* but since that time relaxations have been regularly admitted. At the commencement of the last war it was so allowed to be, and on that account the same principle was so enforced; the principle might not be abandoned, but the fact being, that the French had opened their ports, the principle was not applied. In the same manner the French have opened their ports in this war, and various relaxations have been admitted; it is now held to be an allowable trade from a neutral country to the colony of a belligerent. The war commenced with a general prohibition in the instructions of November, 1793, and all vessels were directed to be taken that were carrying supplies to the colonies of the enemy, or bringing produce from them; but these were relaxed in January, 1794, and other instructions issued of narrower extent. It was then directed to bring in those vessels that were carrying West India produce from the West India islands to Europe, and those that appeared to be going to such islands in the West Indies as were under blockade. This seems to be the only restriction on trade to the West India islands, that it should not be going to islands under blockade. This order continued in force four years, till the restriction was still farther taken off, by allowing neutral vessels to carry West India produce to Europe, either to our ports or to the ports of their own country. It is not asserted that the whole of the colonial trade



is laid open by these relaxations, or that a neutral ship might go from a port of France to a colony and back again to France, making one whole and entire transaction. In that case the returns would be projected before the voyage began; and that, it must be allowed, \* would be only the trade of the enemy on increased [ \* 193 ] freight. But as to separate voyages the matter is very different; as well in regard to the nature and effect of the trade itself, as to the terms of the instructions respecting it. The legality of the trade homeward from the colony to France, is a question at present suspended before the Lords; and such a trade might be construed to fall within the scope of the king's instructions, although it is not so affirmatively expressed; but this trade outward to the colony cannot, by any implication, come within the terms of the instruction. It remains then, only to inquire, Whether there is any thing in the nature of it, that should induce the court to consider it as illegal? It cannot be illegal on the ground that it is not legal for the neutral to go to the colony of the enemy, because he is now allowed to go from his own port; therefore the same supplies may be afforded. It cannot be, that he assists the enemy by taking articles from the mother country; that he might do circuitously, by going to his own country first, with equal advantage to the mother country, in respect to its revenue arising from duties. On these grounds it cannot be illegal; neither is it made so by notification, or in the king's instructions to his cruisers. With respect to authorities, it cannot be expected that there should be any. The question has not arisen in this war; or it would not be to be discussed so much at length in the present case. During the last war there could not arise any precedent, as there was then a general relaxation. But there is a case, of *The Vernagling*,<sup>1</sup> in 1786, where freight was given to a neutral ship going from Marseilles to a French colony and back; from which it appears that, whilst neutrals were admitted generally to partake in \* the colonial trade, it was not thought to af- [ \* 194 ] ford any ground of distinction that they were going from a French port.

## JUDGMENT.

SIR W. SCOTT. This is the case of a ship taken on a voyage originally from Hamburg, first to Bourdeaux, where she discharged part of her cargo, and, having taken on board other goods, proceeded to the colony of St. Domingo, and was taken in this period of the voyage. The first point made, on the part of the claimants, is, that St. Domingo is not to be considered as a French colony, but as in a

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<sup>1</sup> Vide vol. i. p. 300.

state of independence; and a second point made is, that even if it were considered as French, yet, as the English have themselves traded with that island, this must be deemed a permission to the subjects of neutral countries to do the like. In proof of the former allegation, an attempt was made to introduce extracts from the common English newspapers, which the court would not permit to be read; the Gazette is the only authority of this species admitted and respected by the court, for reasons too obvious to require a particular notice. From other more legitimate evidence than any contained in unauthorized publications of that nature, I think it is legally to be held that St. Domingo continues a French colony. It appears that a direct commercial correspondence and communication is carried on between France and that island, which could hardly be if it was deemed to be in a state of revolt and disruption from the mother country. The French custom-house ordinances and regulations appear all to be in full force there; ships go certificated and [ \* 195 ] bonded, as upon the former system; and if there are \* parts of the island not under French dominion, it does not at all appear that it was in view of the present parties to trade with those parts exclusively.

Upon the second preliminary point, namely, that an English trading with this French colony must, at all events, be deemed an authorization of the same trade to the subjects of other countries, I have only to observe that it might be admitted to have that effect, if the fact were true in the degree necessary to support the conclusion. The matter of illegality imputed to the present claimants is a direct trading between the mother country of the enemy and his colony, — a lending of themselves to the purpose of a direct communication between the two. To show that Englishmen have traded to St. Domingo, and under the authority of their government, is not showing enough, unless it is likewise shown that they had, under that authority, lent themselves to be the instruments of a direct commercial correspondence between France and its colony. A trading between the dominions of Great Britain and St. Domingo could authorize no more than a trading between the neutral country itself and that colony.

On the other hand, it has been pressed against the claimants that that some part of the cargo which came from Hamburg, and was discharged at Bourdeaux, was contraband; and, being the property of the same persons, would affect the goods which travelled with them from Hamburg, and were proceeding onwards to their ultimate destination of St. Domingo. The goods which are charged to be of the nature of contraband, are hemp, or some similar substance, under another name, fit for the manufacture of ropes. As

\* these commodities are not now remaining on board the [ \*196 ] ship, they cannot become the subjects of any inspection which the court could order, for the purpose of ascertaining their real nature and probable use. It is argued, indeed, that the claimants' agents at Bourdeaux speak, in a letter, of their expectation that the rope-makers employed by the government at that place would purchase them. But it does not appear that these persons had themselves seen the articles, or that they had any thing more than a general hope that the goods might find a vent of that kind. On the other hand, it appears that these goods had been inspected by a British man-of-war at Dover, when the ship put in there in the course of her voyage to Bourdeaux. There is reason to presume that the search was not made in a perfunctory manner; it was made in a harbor where a search could be conveniently made, and by persons generally sincere enough in their desire to make such searches effectual. The inference is, that they were not of a contraband nature; at best it is left ambiguous, and without any particular means remaining of affording a certainty upon the matter. If so, it is useless to inquire what the effect of contraband in such circumstances would have been. I shall say no more, than that I incline to think that the discharge of the goods at Bourdeaux would have extinguished their powers of infection. It would be an extension of this rule of infection, not justified by any former application of it, to say that, after the contraband was actually withdrawn, a mortal taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation even after the contraband itself was out of its reach.

\* Another consideration was likewise pressed against [ \*197 ] these goods,—that, having been entered at Bourdeaux and exported from thence, it must be deemed an actual exportation from that port, and, consequently, that they are liable to be treated legally in the same manner (whatever that manner may be,) as the goods first put on board at Bourdeaux. I incline to think that this would be much too rigorous an application of principles rather belonging to the revenue law of this kingdom,—a system of law having little in common with the general prize law of nations,—and that these goods are entitled to be considered as coming from Hamburg, the original place of their shipment; and former decisions having fully established that a direct commerce from a neutral country to a French settlement was open, I decree restitution of these goods, which all appear to be neutral property.<sup>1</sup>

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<sup>1</sup> [For decisions as to continuity of voyages, see *The Maria*, 5 C. Rob. 265, and note.]

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, namely, whether neutral property, engaged in a direct traffic between the enemy and his colonies, is to be considered by this court as liable to confiscation. And first, with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles, (in both which cases their property is liable to be condemned,) and of their ships being liable to visitation and search; in which case, [ \*198 ] however, they are entitled to freight and expenses. \* I do not mean to say that, in the accidents of a war, the property of neutrals may not be variously entangled and endangered; in the nature of human connections, it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniences are more than fully balanced by the enlargement of their commerce. The trade of the belligerents is usually interrupted in a great degree, and falls, in the same degree, into the lap of neutrals. But, without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title, — and such I take to be the colonial trade, generally speaking.

What is the colonial trade, generally speaking? It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs, and this to a double use: that of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions. To these two purposes of the mother country the general policy respecting colonies belonging to the [ \*199 ] states of Europe \* has restricted them. With respect to other countries, generally speaking, the colony has no existence. It is possible that, indirectly and remotely, such colonies may affect the commerce of other countries. The manufactures of Ger-

many may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany; but, as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes, they are not in the same planet. If they were annihilated, it would make no chasm in the commercial map of Hamburg. If Guadaloupe could be sunk in the sea, by the effect of hostility, at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England, if it could be made the subject of a similar act of violence. But such events would find their way into the chronicles of other countries as events of disinterested curiosity, and nothing more.

Upon the interruption of a war, what are the rights of belligerents and neutrals respectively, regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? \* No existing interest of his is [ \* 200 ] affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, — “ True it is you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and, by sharing its benefits, prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we have never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has effected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself. We insist to share the fruits of your victories; and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.”

Upon these grounds, it cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of

war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure not of French councils, but of British force.

Upon these and other grounds, which I shall not at present [\* 201] sent enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe.

Upon further inquiry it turned out that one favored nation, the Americans, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case. Whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession.

Different degrees of relaxation have been expressed in different instructions issued at various times during the existence of the war. It is admitted that no such relaxation has gone the length of authorizing a direct commerce of neutrals between the mother country of the enemy and its colonies; because such a commerce could not be admitted without a total surrender of the principle; for allow such a commerce to neutrals, and the mother country of the enemy recovers, with some increase of expense, the direct market of the colonies, and the direct influx of their productions. It enjoys, as before, the duties of import and export, the same facilities of sale and supply, and the mass of public inconvenience is very slightly diminished.

[\* 202] Even supposing that this trade is carried on with integrity, (which it is difficult to hope under all the temptations and opportunities of fraud which a direct intercourse will supply,) there is every reason to believe that the ancient monopoly will, in effect, revive itself without the aid of exclusive prohibitions. The force of long established connection, and of ancient habits of trade, would in a great measure preserve for a time to the mother country its ancient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

Much argument has been employed on grounds of commercial

analogy; this trade is allowed; that trade is not more injurious. Why not that to be considered as equally permitted? The obvious answer is, that the true rule to this court is, the text of the instructions; what is not found therein permitted, is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis et gradus* would be entitled to the favor of the permission; but the relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation. Where it has distinguished, and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of France to his own country and from thence directly to the French colony. Why not immediately from France, since the same purpose \*is effected? It is to be answered, that it is effected [ \*203 ] in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufacture of France into his own country, (which he will rarely do if he has like manufactures of his own, but which in all cases he has an uncontrollable right to do,) and exports them afterwards to the French colony, which he does not in their original French character, but as goods which, by importation, had become a part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expense. So if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother country under a proportionable disadvantage; in short the rule presses upon the supply at both extremities, and, therefore, if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade, that considerations of this nature have their chief and most effective operation.

It is an argument rather of a more legal nature than any derived from these general topics of commercial policy, that variations are made in the commercial systems of every country, in wars and on account of wars, by means of which neutrals are admitted and invited into different kinds of trade, for they which stand usually excluded; and if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind \*made [ \*204 ] for similar reasons in the commercial policy of its enemy.

And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war and on account of the state of war, the party who makes it binds himself in all the variations to which the necessities of the enemy can compel him, the whole colony trade of the enemy is legalized; and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself; although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war, it is frequently a peace measure in the colonial system of every country; there are others which more directly arise out of the necessities of war. The admission of foreigners into the merchant service as well as into the military service of this country; the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation and other regulations founded thereon; these, it is true, take place in war, and arise out of a state of war, but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom, and that I take to be the true foundation of the principle. It is not every convenience or even every necessity arising out of a state of war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus in time [ \* 205 ] of war every country admits foreigners into its general service; every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive, either by means of his navigation or its own. These are ordinary measures to which every country has resort in every war, whether prosperous or adverse. They arise, it is true, out of a state of war, but are totally independent of its events, and have, therefore, no common origin with these compelled relaxations of the colonial monopoly; these are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged and have their force; it is sufficient that the variations alluded to, stand upon grounds of a most distinguishable nature.

Upon the whole view of the case as it concerns the goods shipped at Bourdeaux, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this



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The Immanuel. 2 C. Rob.

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subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that I am not authorized, either by general legal principles applying to this commerce, or by the letter of the king's instructions, to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. I see no favorable distinction between an outward voyage and a return voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned.

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods \*could be consi- [\*206] dered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule. I incline to apply a more favorable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights; it is a case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from Hamburg in the commencement of the voyage; she was not picked up for this particular occasion, but was intended to be employed in her owner's general commerce. Attending to these considerations, I shall go no further than to pronounce for a forfeiture of freight and expenses, with a restitution of the vessel.

Cargo, taken in at Bourdeaux, condemned. Ship restored, without freight.

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On the same day, in the case of *THE ROSE*, Young, master,

WHICH was a case of an American ship going from Amsterdam to Guadaloupe, with an assorted cargo, claimed on behalf of American merchants.

The Court. With respect to this case it differs only from the last, in this circumstance, that it is the case of a voyage from one enemy to the colony of another enemy allied in the war. I am of opinion, that this does not form a solid distinction. On the principles which I have laid down, I think it would be impossible to maintain the rule of law without applying it also in this extent.

Sentence — the same.

[ \*209 ]      \*THE CHRISTOPHER, Slyboom, master.

November 18, 1799.

Condemnation in France of a British ship, taken by a French privateer into a Spanish port, and lying there at the time of condemnation, held valid. [Spain being the ally of France.]<sup>1</sup>

THIS was a case of a British prize-ship taken by the French, and carried into the Spanish port of St. Sebastian; from whence the ship's papers were transmitted to France, and a sentence of condemnation passed at Bayonne, May 9th, the ship still lying in the Spanish port. The ship was then sold to the present claimant, a merchant of Altona; and was sailing at the time of capture, July, 1799, in ballast, from St. Sebastian to Altona.

On the part of the captors. It was contended under the authority of *The Fladoyen*,<sup>2</sup> that this was a purchase resting on an illegal sentence of condemnation; and, therefore, that it could not avail, to transfer any right or just title to the neutral claimant.

#### JUDGMENT.

SIR W. SCOTT. This is a case materially differing from those in which condemnation has passed on ships carried into a neutral country; those proceedings have been held illegal, principally, [ \*210 ] because it was not to be presumed that a neutral government would so far depart from the duties of neutrality as to permit the exercise of that last and crowning act of hostility, if I may so express myself, the condemnation of the property of one belligerent to the other; thereby confirming and securing him in the acquisition of his enemy's property by hostile means. But this will not hold good with respect to condemnations passed on ships brought into the ports of an ally in the war. In such cases there is nothing to prevent the government from proceeding to that last act of hostility; there is a common interest between them on the subject; and both governments may be presumed to authorize any measures conducing to give effect to their arms; and to consider each other's ports as mutually subservient. I am, therefore, inclined to hold such a

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<sup>1</sup> [*Oddy v. Bovill*, 2 East 473.]

<sup>2</sup> [1 C. Rob. 135.]

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The Gertruyda. 2 C. Rob.

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condemnation sufficient, in regard to property taken in the course of the operations of a common war.

As the facts of purchase appear to be sufficiently proved on the farther proof that has been exhibited, I shall decree restitution of this ship for the claimants.

Ship restored.<sup>1</sup>

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\* THE GERTRUYDA, De Vries, master. [ \* 211 ]

November 19, 1799.

Dutch ships detained in port at the Cape of Good Hope, before declaration of hostilities against Holland, claimed as droits of admiralty: condemned to the crown, *jure coronæ*.

THIS was a case on the admission of an allegation on the part of the admiralty, claiming to have the Dutch ships taken by Lord Keith at the Cape of Good Hope condemned, as droits of admiralty; as being taken in port subsequent to the declaration of hostilities against Holland.

Against the admission of the allegation, the *King's Advocate* and *Arnold*. The question before the court arises on a capture made in the year 1795; and it is undoubtedly to be lamented on all sides, that distribution should have been long prevented by any conflicting claims, as to the manner in which it shall be condemned. It now comes forward on an opposition to the allegation, that, if the court should think there is no ground to sustain the demand set up on the part of the admiralty, all farther delay may be removed. The question is, whether certain ships taken by Lord Keith at the Cape of

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<sup>1</sup> In *The Harmony*, Elbrecht, Nov. 18th, 1799, which was a case of a British prize-ship taken by a French privateer, and carried to *Helvetiains*, and condemned by the French Commisary of Marine, at Rotterdam, 6 Prair. an 8, 25 May, 1798; and in the case of *The Adelaide*, Pietrom, under circumstances exactly similar; further proof being required to be given of the property, and of the *bond fide* transfer to the neutral claimant, the question of law respecting the legality of such condemnations was expressly reserved.

In *The Betsy*, Kruger, 19 August, 1800, which was a case under circumstances exactly similar, the question of law was waived; and the legality of the condemnation being admitted by the court, further proof was directed to be made of the fact of transfer.

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The Gertruyda. 2 C. Rob.

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Good Hope, and detained by him there previous to the act of capture, shall be condemned to the king *jure coronæ*, or as droits of admiralty. The distinction of law on this point, it is apprehended, has been long clearly established, "that all vessels detained in port, and found there at the breaking out of hostilities, are condemned *jure coronæ* to the king; and that all coming in after hostilities, not voluntarily, by revolt, but ignorant of the fact, are to be condemned as droits of admiralty." The only doubt that can be made

[ \* 212 ] \* in the present question is, to determine under which of these descriptions these ships are, under all the circumstances preceding and attending the capture, to be considered. The circumstances are briefly these:— On the 11th of June, 1795, Lord Keith sailed into Symonds Bay, and found several Dutch ships lying there; a Dutch packet was allowed to sail, and also a Dutch frigate, The Midenbleck, on the 21st June; but the ships in question, and several other merchant ships lying there, were not permitted to depart.

Lord Keith wrote to the commanders of the Dutch ships on the 28th June, stating "that, from some unfriendly appearances in the Governor and Council at the Cape, he was apprehensive of a design to deliver the colony at the Cape to the French faction that had overrun the mother country; and that he was commissioned by the king of Great Britain, in conjunction with the stadtholder, to prevent such a measure, and accordingly laid his commands on them not to move from that place."

It is impossible to contend, therefore, that there was not a detention and embargo and restraint of princes in this case, or that the property subsequently taken as prize, in consequence of such detention, is to be distinguished in any way from property taken, under similar circumstances, in Europe. On the 9th of July a farther communication was made by Lord Keith, "that it would be necessary for him to put some of his men on board, to prevent any waste or damage of the cargo of the ships, or any mischievous intention that might be formed of setting fire to them; but that the ves-

[ \* 213 ] sels were not to \* be considered as seized." It is on this expression, perhaps, that the claim of the admiralty is now set up; but, whatever might be the terms of the intercourse, it is impossible to say these ships were not precisely under the very same circumstances, in point of fact, as all other Dutch property detained in the ports of this kingdom.

All this passed previous to the declaration of hostilities against Holland, which did not issue till the 15th of September, 1795. On the 18th, Captain Hardy took possession of one of the Dutch ships, The Williamstadt en Boetslaar, for his Majesty's service, under a commis-

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The Gertruyda. 2 C. Rob.

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sion granted to him on the 12th of that month by Lord Keith; this was all that happened previous to the knowledge of the declaration of hostilities against Holland. These ships remained in the same state till the month of May, 1796, when the intelligence of hostilities was received at the Cape, and immediately the Dutch flags were struck, and the ships taken possession of as prize. A similar question has already been determined in the case of *The Overysse*, which was a Dutch ship of war, detained in an Irish port in the month of March, 1795, and carried into the Cove of Cork for security, till after the declaration of hostilities. The colors were struck October, 1795, and the ship has since been condemned as prize to the crown. The detention which has happened, as well in that case as in the present, is all that can in any case take place. It is not necessary that an actual seizure shall be made, in the form of prize, because before the proclamation issues, that cannot be. An embargo, or the forcible detaining of such vessels, \*is all that can in the first [ \* 214 ] instance be put in force. It has taken place in this instance; and it is submitted that these ships stand in the same situation and must follow the same course as all the other Dutch property detained in the ports of this kingdom, before the actual declaration of hostilities, and since condemned *jure coronæ* to the king.

For the allegation, the *Advocate of the Admiralty* and *Laurence*. If, in the ports of this kingdom, an order of council puts a general embargo on the ships of any foreign state, and reprisals afterwards take place, it is not contended that such vessels would not be condemnable as prize to the king, *jure coronæ*. The *Overysse* was a case of that description, and no question was raised about it. It passed in a manner *sub silentio*, as a matter of common condemnation, and no observation was made upon it, but many material distinctions seem to render that case no authority on the present question. That ship was detained on an embargo laid on the ports of this kingdom, and operating therefore with just force and authority to produce its effect. But no embargo issuing in this country can operate with any effect, beyond the limits of his Majesty's realms. It is a mere nullity as to other countries; and no instance can be produced of an attempt to lay an embargo on the ports of a foreign power. The detention, therefore, which is asserted to have taken place in this case, could not, if it were proved, operate as an ordinary embargo, which puts the object into the legal possession of the crown, and therefore affords a commencement to the right of prize if hostilities afterwards ensue on the part of the crown. It \*could not in law [ \* 215 ] have operated to this effect, had it been the intention of the

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parties to have done so. But the very terms of the letters that passed are sufficient to convince the court that during the whole of this previous transaction, nothing of an hostile nature ever entered into the contemplation of the parties. The first letter<sup>1</sup> states, that as the appearance on the part of the colony make it doubtful whether there may not be an intention to deliver up the colony to the French, and as my instructions particularly direct me to prevent such a measure, and secure the property of the East India Company, and [ \* 216 ] "protect it from embezzlement, I am to inform you that no vessel will be permitted to sail but under a ship belonging to the States, or a British ship. From this it is evident that it was no plan, even of absolute detention, on the part of this nation; but a mere act of caution to prevent these ships from falling into the hands of the French. Another passage in the same letter is still stronger, "You are to remain and keep a strict watch over the ship and cargo, until the same can be restored to the lawful owner;" showing that there was no design of divesting the Dutch owner of his interest.

The second letter<sup>2</sup> states an apprehension of embezzlement and

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<sup>1</sup> Letter No. 1.

"Whereas from the present unfriendly appearances on the part of the governor and council of the Cape, towards the ancient friends and allies of Holland, it is doubtful whether there may not be an intention of delivering the colony to the French faction, which have overrun the mother country; and being directed by the king, my sovereign, in conjunction with the prince stadtholder, to resist the same, and to secure all ships and public property belonging to the Dutch East India Company, and to keep and protect the same from embezzlement, and to prevent its falling into the hands of the enemy, and also to prevent all ships of the said country from sailing, unless under the protection of a State's ship or British ship of war. I do, therefore, in consequence of those instructions, command you not to move from this place, but to remain here and keep a strict and careful watch over the ship and cargo intrusted to your charge, until the same can be restored to the lawful owner; and should you refuse to obey the stadtholder's orders, signified through me, you are at liberty to depart with all your private effects and property, and all such who choose to remain and abide at their duty shall be protected in the due exercise of the same.

" 28th June, 1795."

"To the captains and commanders of the  
Dutch ships now in Symonds Bay."

<sup>2</sup> Letter No. 2.

"Whereas I understand that great waste and damage is done to the property of the Dutch East India Company, every night, by order of the governor; and have reason to believe he hath sent or intends to send orders of a similar nature to the ships in this bay, and to set fire to them, which will endanger those of his Majesty under my command, therefore to prevent any such mischievous intentions from being put into execu-

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a design of setting fire to their ships, which might endanger the English fleet, and made it \* necessary to send officers [ \* 217 ] and men to prevent any irregularity of that kind. From these letters it appears that the measures pursued were merely of a provisional nature, and were in no degree connected with any hostile purpose on the part of the English squadron; and it is not at this day competent to any person to attempt to fix on them a meaning different from the obvious intention of the parties at that time. The intention is still more strongly evidenced by the fact of letting a ship of war depart. Had any notion of hostility prevailed, this ship of war would have been the first object to be detained; it was so in Europe with The Overysseel. That ship was immediately detained; and it cannot fail to press itself on the mind of the court, that these different modes of acting show more clearly than words can speak, that a different principle of action governed the proceedings. In England, the embargo, following the general nature of embargoes, was connected with a latent purpose of confiscating the property as prize, if reprisals should ensue. At the Cape, no such purpose prevailed. It was a state of simple caution only, to prevent the property from falling into the hands of the French; and in that state things continued till after the surrender of the Cape. From the moment \* of surrender the port became a British port, under the pro- [ \* 218 ] tection of the Lord High Admiral; and therefore any seizure made in it of enemy's property, after that time, is to be considered as made in his name. No seizure was made of the ships in question as prize, till May, 1796, and therefore it is submitted they are to be considered as droits and perquisites of admiralty.

#### JUDGMENT.

SIR W. SCOTT. This question arises on certain Dutch ships which were found at the Cape of Good Hope, by the squadron under the

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tion, I find myself obliged to send officers and men to watch and make known any irregularity that may take place.

" 9th July, 1795.

" G. K. ELPHINSTONE."

No. 3.

" Monarch, 9th July, 1795.

Orders to the captains of British ships.

" You are to send an officer, a midshipman and six men to one of the Dutch ships, to be relieved every day; to keep a strict watch that the ships are not plundered or fired, to endanger the fleet.

" They are to be circumspect in their conduct, and to use nothing belonging to the ships, which are not to be considered as seized.

" But you are to use every means to protect and assist the commanders in protecting the ship's cargoes, and the men's private property."

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The Gertruyda. 2 C. Rob.

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command of Lord Keith, and which have been proceeded against as prize, on the part of his Majesty, *jure corona*. An intervention has been now given on the part of the admiralty, claiming them as droits and perquisites of admiralty; and there can be no doubt that such an intervention may be rightly given, because as long as the office of Lord High Admiral, though now residing in the person of his Majesty, continues in this kingdom to have a legal existence, it is extremely proper that the droits and perquisites of the office should continue as anciently distinguished; and although the difference may not be very important as to any immediate consequence under the present application of them (which is directed by the treasury, and not by the admiralty), it is still fit that they should be strictly determined, and with as much exact observance of the ancient rules, as if the proceeds were carried in the ancient and distinct course. Amongst

these rules, I take it to be an established maxim that the [\* 219] rights of the Lord High Admiral \* are to be considered as rights *stricti juris*, as rights originally granted in derogation of those higher rights of the crown which are vested in the crown for general utility. Such grants are to be construed strictly on the known presumption that the crown has not parted with any right which the public wisdom has conferred upon it, further than the express words of the grant import.<sup>1</sup>

The grant alluded to is to be found recognized in the order of council of Charles II.<sup>2</sup> That order, among other things, directs, "That all ships and goods belonging to enemies coming into any port, creek, or road of this his Majesty's kingdom of England, or of Ireland, by stress of weather or other accident, or mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral;" but certainly not in foreign ports. It is the first time that I ever heard the idea started, that it was to extend beyond the dominions of the crown, to ports belonging to foreign powers. Besides, it has always been understood that such a coming in must be during the subsisting war. The very terms used, "by mistake of port, or ignorance, not knowing of the war," necessarily imply that; and all other seizures made anywhere else, or under any other circumstances, before a war, do belong to his Majesty.

This being the case, let us see how the terms of this order apply to the circumstances of the present case. On the breaking out, I cannot say of war, but of that ambiguous situation into which the irregular

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<sup>1</sup> [The Rebecca, 1 C. Rob. 227; The Maria Francon, 6 C. Rob. 282.]

<sup>2</sup> [The order will be found in 1 C. Rob. 230, n. Also in Hay and Marriot, p. 50.]



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The *Gertruyda*. 2 C. Rob.

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conduct of France had put different countries, by dissolving the connection between the governors and the governed,\* [ \* 220 ] it was found necessary, when Holland became exposed to the invasion of the French arms, to detain by the strong hand of power, a number of Dutch ships in the ports of this kingdom. At the same time, conciliating language was used to the proprietors, and promises were held out to all such as should voluntarily come in, that their property should be restored to them. It is notorious also, that on the declaration of hostilities that ensued, these seizures were enforced with a retrospective operation, on all who had not complied with the terms; and were not considered as mere civil embargoes, but as acts of forcible possession, on which the property so seized, was finally condemned as prize to the crown.<sup>1</sup> Now, unless very strong and solid distinctions can be pointed out between this case and those which have pursued this course, I see no reason why this should not journey in the same track. Two or three distinctions have been taken. In the first place, it is said, that the detention in the ports of England, was a mere civil embargo; and that an embargo of that nature could not extend to foreign ports, where the crown of England has no jurisdiction. In the first place, it is not necessary that the embargo should be exactly of the same nature, in order to vest the rights of the crown; for any mode of forcible occupancy or detainer prior to hostilities is sufficient for the purpose; and secondly, the nature of the embargo in the ports of this kingdom is not very accurately described, when it is termed a mere civil embargo; for it was a detention by actual force applied to them. The \* ships were generally taken possession of by [ \* 221 ] an armed power. It was not the mere hand of the custom-house that was laid upon them, in the civil mode of forbidding an egress; but it was a restraint and compulsion, acting by the terror and use of force. The embargo at the Cape was likewise an embargo of force; and the very argument that it could not be a civil embargo, because this government had no right to lay on a civil embargo in a foreign port, proves that it was an embargo of force; though, if it was at all necessary that it should partake of any thing like a civil authority, it must be remembered that the stadtholder's name and authority is likewise employed; but it is notorious, that some ships of war that attempted forcibly to escape, were forcibly detained; that is enough to show its nature, if it were at all necessary.

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<sup>1</sup> [See *The Boedes Lust*, 5 C. Rob. 245.]

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The Gertruyda. 2 C. Rob.

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Another distinction is, that in this case a ship of war was allowed to go away, whilst in England, a ship of war, The Overysseel, was detained. I think it does not appear, under what particular motive the permission to depart was given; it might be under an understanding that the ship was going to some other port, where dispositions favorable to the stadtholder might be expected. I think the terms of the letter lead us to conjecture that there must have been some such motive, as I have stated; because it could not be supposed that she was allowed to depart, as going to the mother country, when the same letter expressly states that country to be in the hands of the French, as in fact it now remains. That permission to the ship of [ \* 222 ] war, must at any rate be taken, as a peculiar \* permission, influenced by some particular inducement, and therefore affording no ground, by which we can be justified in distinguishing that embargo from what took place here, much in the same style.

The question is indeed, not so much how the matter was conducted, but whether they were in truth detained or not; that I must understand, from the very terms of these letters, which it is impossible to understand in any other way; because, when it is said they would not be allowed to depart, but under a ship of the state, I must understand it to mean, a ship in the service of the stadtholder. Looking at this, I must suppose, that it was conducted only with that moderate and soothing language which was used also in this country; but, that the ships were in no degree less under the gripe of power than those under detention here. They were not allowed to depart, unless under a British ship, or a ship that had declared its attachment and obedience to the ally of this country. I must therefore consider it as being as effectual a detention as that used here, and *eodem intuitu*. Indeed it is impossible to suppose, that any real distinction was intended to be made between property detained here, and property detained there. It was all intended to be subject to the same final application, whatever that might be; and, though local circumstances might call for some difference in the apparent mode of treatment for the present, yet the real intention, and the ultimate destination was the same in both. It was not, as was asserted, for the mere purpose of caution, to prevent their falling into the hands of the French, but for the further purpose of securing them for [ \* 223 ] \* British use, in case subsequent events should disqualify the Dutch proprietors for restitution.

As for the expression, "that they were not to be considered as seized," I look upon that to be nothing more than the same sort of softer language, of present policy, that was used here, in a situation of affairs that required some management and address; and when

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one observes the actual and effectual detention for nine months, during which time these ships would have moved off if they had not been forcibly restrained, it is impossible to suffer the mere expression and style of the letter to alter the real consequences, or distinguish them from those which took place here under similar circumstances.

The Cape in the end surrendered, and certainly as a hostile colony. The very next day it is stated that captain Hardy was commissioned to take the command of one of these vessels; this was before the declaration of hostilities against Holland was known at the Cape, and it affords, I think, a pretty authentic exposition of the intention under which the first possession was taken. The colors were not formally taken down till a subsequent day, after the declaration of hostility had arrived, but the ships had not been less really under the power of the English squadron. Generally speaking, the taking down of the colors is the formal act of surrender; but in the present case it is evident that it was an unsubstantial form, and that no surrender was required.

Under these circumstances I cannot think that the distinctions taken in this case do materially vary it \* from the [\* 224] cases of seizure of all other Dutch property at the same time; and therefore I reject the allegation.

Allegation on the part of the Admiralty rejected.

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## INSTANCE COURT.

THE SALLY, Joy, master.

November 22, 1799.

Appeal from Vice-Admiralty Courts in the West Indies, in a revenue case. Time of appeal—protest of respondent as to one of the sentences, as it was called, overruled. Whole considered as one sentence

THIS was a motion made for an inhibition on the Vice-Admiralty Court of New Brunswick, in a revenue cause, in which that court had pronounced, March 26, 1798, that there was no cause of seizure, and in August, 1799, had farther proceeded to decree costs against the seizor.

It was now submitted by the *King's Advocate* that the cause was not to be considered as finally determined till after the decree for costs. That it was from the date of that definitive sentence that the

time for appeal was to be reckoned; and that the seizor was at liberty, within the accustomed time from that period, to appeal, as well from the sentence of restitution, as from the decree of costs.

No opposition being given, the Court said, I shall suffer the inhibition to issue; it will be for the parties to take their exception.

On the 27th of January, 1801, the case came on again, on act and petition of the party appearing under protest to the inhibition, and praying that it might be relaxed.

[ \* 225 ] \* In support of the protest, *Swabey and Sewell*. The proceedings out of which this application arises have been these : — On the 19th of October, 1795, this vessel, with a cargo of provisions, being the property of N. Godard and other merchants of America, was seized in the port of St. John, in New Brunswick, and proceeded against, on the part of the collector of the customs, for importing such provisions contrary to statute. On the 9th of March, 1798, the judge of the Vice-Admiralty Court of New Brunswick pronounced “that there was no probable ground of seizure;” and on the 1st of August, 1799, he proceeded farther to pronounce “the costs of the suit to be paid by the seizor.” The suspension of the proceedings during this interval was occasioned by an appeal, which the seizor entered, *apud acta*, against the first sentence, accompanied by an apprehension on the part of the judge that he was stopped from proceeding farther in the cause. During this time the judge waited, but at length finding that no inhibition had issued against him, he finally proceeded on the 1st of August, 1799, to make a farther decree on the question of costs.

To the appeal, prosecuted from this decree of costs on the part of the seizor, the respondents are ready to appear absolutely, and submit the merits of the question of costs to the court. But, as to the former sentence, it is submitted, on their part, that the time of appeal is elapsed, and therefore that the seizor must be pronounced to have deserted his appeal on that sentence. The time for appeal is known to be twelve months. Originally it was expected that the whole cause would be finally determined within that term; and, so late as the middle of the last century, it was the practice to make a special application to the court to be admitted to a second year.

[ \* 226 ] This practice has \* fallen into disuse, as to the termination of the suit; but as to the term within which the appeal should be prosecuted, it still remains according to the practice of the civil law, which is recognized in a late statute, 38 Geo. 3, ch. 38,

sec. 2, for regulating the time of appeal on seizures of another nature,<sup>1</sup> as the law of nations, and as the law proper to be adhered to in Courts of Admiralty.

That the seizor was understood, on all sides, to have appealed from the first sentence, is evident from his words and the conduct of the court below. The judge deferred to his appeal. Had it been a mere protestation of appeal, and not an actual appeal, the judge might have assigned the party a term within which to prosecute it; but being an actual appeal, and immediately allowed by the judge, the court, by that act, in law concluded itself; and did, in fact, accordingly abstain from proceeding farther in the cause. And at last, when he went on to entertain the question of costs, the appellant himself alleges, not generally, that he appeals, but "that he farther appeals."

The term, therefore, for the appeal on the first point, is to be reckoned from the actual appeal interposed on the former sentence; from which time it was near a year and a half before the appellant took any step to prosecute his appeal, and therefore he is to be pronounced to have deserted it. And the respondents are entitled to have the inhibition relaxed, as far as it applies to the first decree.

On the other side, the *King's Advocate* and *Croke*. It is not very easy to understand what is meant by representing the proceedings of the court below as two decrees and two sentences. According to "the practice of the Court of Admiralty, a party [ \* 227 ] can only appeal from a definitive sentence, or a decree having the force and effect of a definitive sentence; and therefore the power is reserved to him of appealing, at the same time, from all grievances that have been done previously, or inflicted by the judge from whom the appeal is brought. In the Ecclesiastical Courts, following the different practice of the canon law, it is otherwise; and if a party proceeds to take any step after the grievance complained of, he is held to have perempted his appeal. This is a distinction arising from the different processes of the civil and the canon law; but in the Admiralty Courts, which are regulated by the former, the party has an undoubted right to appeal at the final sentence, which, in this case, must be taken to be the decree on the question of costs; and whatever may have been done irregularly, or said in informal language before this time, cannot deprive him of this right. It is from this time, therefore, (1st August, 1799,) that the term of appeal

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<sup>1</sup> In prize causes.

is to be reckoned; and, in respect to that, there is no attempt to say that his time had elapsed before the commencement of the proceedings here. As to the understanding of the party, it is not material whether he was under a mistake or not; but, by his conduct, he appears to have waited for the final decree. Notwithstanding the protestation of appeal, in the first instance, no bail was given or required for prosecuting the appeal till after the decree of 1st August, 1799, and then bail was given to prosecute the appeal on both points.

*Swabey.* In these causes it is not necessary to give bail, as in prize causes; therefore no inference arises from that.

[ \* 228 ]      \* JUDGMENT.

SIR W. SCOTT. This is an application under protest, as I understand it, against the form in which the inhibition is now drawn, as upon two sentences; because it is not contended that it is not good against one, that is, against the last sentence, or that the party is not bound to appear to it, or that the court is not bound to determine on the second question.

I should have been obliged to the gentlemen who have argued for the appeal on the last sentence exclusively, if they had put me in possession of any manner of determining the second question, without considering the other at the same time. The former sentence, as it is called, pronounced that there was no probable cause of seizure; which, in effect, by necessary implication, did determine that costs were due. Therefore it would be impossible for me to administer substantial justice on this question of costs whilst there stands such a judicial declaration, which I am not at all at liberty to consider, whether it is well founded or not. The court must consider both sentences, or it must dismiss the appeal altogether; or it must follow up, with a blind and mechanical obedience, that declaration of the inferior court, by giving costs as a necessary consequence, on the propriety of which it has no power to deliberate or inquire.

I need not observe that it has never been the practice of this court, on appeals from Vice-Admiralty Courts in the West Indies, to tie them down to nice rules of practice, which we know are not much attended to in those courts; the practitioners there having not much of that sort of business which familiarizes the minds of men to great exactness in these matters. There are, however, great inter-  
[ \* 229 ] rests \* confided to those courts, particularly with respect to the enforcement of the revenue laws; and it might be the means as well of oppressing individuals as of defrauding govern-

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ment, if, on appeals, this court was to judge by those correcter rules of practice which would be observed here in similar cases, (if this court exercised any original jurisdiction upon them,) but which are not familiar to the practitioners there, and appear not to be attended to in the original proceedings.

This court, therefore, looks to find out the real merits of the question, without attending much to the irregularity of proceeding in which they are frequently involved and buried. It takes no advantage of such irregularities against the one party or the other. It takes the question, and considers and treats it as it conceives it ought to have been considered and treated in the court below, and pursues the real meaning of the parties as it supposes that meaning would have been led and directed by practisers capable of conducting it with precision and regularity.

With respect to time, it particularly has never been the practice of this court to construe the limitation of time for appeals with the same strictness as would be applied to appeals from courts of this country. It has been held that the statute of Hen. VIII. does not apply to cases in the plantations, but that it is left to the discretion of the court to entertain an appeal. The circumstances of the present case show the reasonableness of this exception; for although the only fact to be examined was, (as far as I can infer from what is at present before me,) whether an American ship came into the port of St. John in breach of the navigation act, in October, 1795, \* it is not till two years and a half after, although the pro- [\* 230] ceedings were immediately commenced, and almost in the very spot where the transaction happened, that the judge proceeds to sentence, in a matter on which one would suppose that even a cautious and deliberate justice might have been dispensed within six weeks; and the court is then delivered of only a half sentence, — an imperfect thing, which requires the labor of a year and a half more in order to perfect and bring it into regular shape and substance. When such indulgence as this, in point of time, is allowed in these courts, this court will not be too precise in holding the parties strictly to their time of appeal; nor will it look with scrupulous accuracy to the phraseology and style of their minutes, nor to the common errors in which both the parties and the practitioners appear to have been involved.

In the present case, the judge pronounces "that there is no probable cause of seizure, and that the ship and cargo ought to be restored." The seizor immediately appeals, (as he says,) and the judge, upon that, abstains from proceeding any farther, makes no order as to costs, but leaves the sentence in this suspensive state,

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implying that costs ought to be given, but not giving any costs expressly. Certainly the appeal or protestation, or whatever it is to be called, of the seizor, needed not to have prevented the judge from unfolding his sentence, and expressing in terms what it is evidently intended to imply. It could hardly have been deemed a new act, if he had gone on to infer his conclusions that costs ought to be given against the seizor. However, he does not do this, and the matter remains in this suspended state for another year and a half, — all parties appearing to stand aghast and motionless; the party [ \* 231 ] that had \* appealed not prosecuting his appeal, the party appellate not urging the prosecution of that appeal, nor the court directing any effectual steps to be taken for the purpose. Finally, the party which had obtained this half sentence comes before the court, and prays a determination upon the matter of costs and damages; then the court makes the direct judicial declaration, that costs and damages are due. The appeal from this sentence, and likewise from the other, is regularly pursued. Security is required, and is given, for the effectual prosecution of it; and it seems to have been the common understanding of all parties that the whole merits of the case were devolved to the judgment of the Superior Court.

Indeed, the absolute impossibility of considering and determining, with any degree of justice, the matter of the last sentence taken separately from the other, proves in the most decisive manner the indissoluble connection that subsists between them, and the absolute necessity of considering them in conjunction.

In my view of the latter sentence, it is nothing else than a mere distinct verbal explication of what is implied in the first; unless the first is examined, it is impossible to examine to any effect of justice the second; and the parties having admitted that they are forced to appear to the appeal upon the second, which decrees costs, I think that they are *ex necessitate rei* bound to appear likewise to the appeal upon the first, which decides that there is no just or probable cause of seizure.

Protest overruled.<sup>1</sup>

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<sup>1</sup> An important question having lately occurred in the case of *The Fabius*, respecting the extent of the vice-admiralty jurisdiction in revenue matters, it will be brought forward in this number, without regard to the regular order of dates. [2 C. Rob. 245.]



## \* INSTANCE COURT.

[ \* 232 ]

THE FAVOURITE, Nicholas de Jersey, late master.

November 22, 1799.

Mate becoming master, by capture of former master, allowed to sue for wages as mate through the whole time.<sup>1</sup>

[When master or material men can sue for proceeds in court.]<sup>2</sup>

THIS was a case on petition for wages, and sundry other charges, on the part of Joseph Grout, formerly mate, and late master of the vessel, against the proceeds of the ship *Favourite*, an American ship, which had been proceeded against by a *primum decretum* on the part of — Carver, of Gosport, and Torlades & Co., of Lisbon, holders of bottomry bonds, and sold by a decree of this court, bearing date 17th day of June, 1799.

The history of the vessel as it was detailed in the several proceedings before the court was: That in the month of April, 1797, the above vessel belonging to S. Lewis, of Boston, and commanded by Nicholas de Jersey, master, sailed with a cargo of flour from Havre to Brest; and being taken as prize by a British cruiser, and brought to Portsmouth, was restored by a sentence of the Court of Admiralty; that she was then repaired, refitted, and revictualled, on money taken on bottomry, September 28th, 1797, of — Carver, of Portsmouth, to the amount of 1,283*l.* 17*s.* 8*d.* and sailed to London in ballast, where it was determined to proceed with the ship to St. Ube's, there to load a cargo of salt for Charlestown; that she went to St. Ube's, and having sailed laden with a cargo of salt, was forced into Lisbon in distress, where a farther sum of 100*l.* was taken up on bottomry, from the house of Torlades & Co.; that the [ \* 233 ] vessel then proceeded to Charlestown, but that the master and supercargo, Taylorson, being unable to discharge the aforesaid bottomry bonds, renewed the same by a farther bond of hypothecation, bearing date 14th April, 1798, and covenanted to pay the aforesaid sums with interest, within a reasonable time after the arrival of the ship at Gosport, whither she was then bound; that on that voy-

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<sup>1</sup> [The Unity, 2 Dod. 503; The Adventure, 3 Hagg. Ad. R. 153; 2 Strange, 937; The George, 1 Sumn. 151.]

<sup>2</sup> [Post, p. 236.]

age she was captured by a French privateer, 24th April, 1798, and the aforesaid master, Nicholas de Jersey, was taken on board the privateer, and had never since rejoined the ship; that on her capture, the said vessel was taken to St. Domingo, and released, and sailed again for Charlestown, 2d September, 1798, under the command of Grout, the mate, (now become master from the absence of Nicholas de Jersey); that the vessel being again laden for London, the aforesaid mate Grout was, under the particular circumstances of the case, by the appointment of Taylorson, the supercargo, and with the permission of the collector of the customs, permitted to clear out as master; that on her arrival at London, the aforesaid bonds being presented and not paid, the ship was arrested, and proceeded against, and finally sold by a decree, bearing date 17th June, 1799, on the petition of Runquest and Cowie, agents of the house of Torlades & Co., and holders of the bottomry bond, executed to — Carver, of Gosport.

The summary petition of Joseph Grout set forth that he was hired by Nicholas de Jersey, at Gosport, April, 1797, as mate, to serve on board the said ship, at thirty-five dollars per month; that he continued on board the said ship in the said capacity till her [ \* 234 ] arrival at \*Charlestown, 4th February, 1798, and not being then paid or discharged, did, at the particular request of the master, Nicholas de Jersey, agree to continue on board, and in the service of the ship, on the further voyage; that in the prosecution of that voyage, he became master in the absence and detention of Nicholas de Jersey, as before recited.

The schedule of accounts annexed to the petition contained charges for wages at thirty-five dollars per month, as mate, from 16th April, 1797, to 20th May, 1798. . . . .		£103 7 9
From the 20th May, 1798, the time when the said mate began to act as master, to the 19th June, 1799, at sixty dollars per month, the same as would have been paid to Nicholas de Jersey . . . . .		175 11 0
For balance due on account of said ship, as per items, &c., above cash received. . . . .		84 16 10
		<hr/>
		£363 15 7
		<hr/>

Against the petition, on the part of the bottomry bond holders, *Arnold*. This is a petition, which is liable to so many objections in

different parts of it, that the court will find only one article that can be sustained. It sets out by a demand of wages, for services performed as master; but it has already been decided in the common law courts, in the time of Lord Holt, 12 Mod. 405, that a suit cannot be maintained in the Admiralty Court for the wages of a master; and on these grounds, that although mariners are supposed \*to contract on the credit of the ship, the master's contract [ \* 235 ] is altogether of a personal nature, on the credit of his owner.

It will be said that these cases do not exactly apply to the circumstances of this case, for that this man went out as mate, and, therefore, that his original contract was not on the credit of the owner, but of the ship, and that he succeeded to the office of master, only by devolution, on the capture and detention of the former master. The ship has, however, since that succession, been into an American port, the country of the owner, and, therefore, since that time he stands in the condition of a master, originally appointed, and on the credit of the owner. There are, however, other authorities which reach this distinction, 2 Strange, 937, *Read v. Chapman*, "A man went out as mate, and on the death of the master succeeded to the command and brought home the ship, and sued in the Admiralty Court for his wages as mate, and for a further allowance after he became master; a prohibition was granted, *quoad* the time he was master, and refused *quoad* the time he was mate;" this will be sufficient to dispose of that article. Another article contains a demand for expenses usually incurred by masters for the payment of mariners' wages. But there have been cases on this point also, *Carthew*, 518; *Molloy*, 357; *Fortes*. Rep. 230; where a master having sued in the Court of Admiralty for seamen's wages paid by him, a prohibition was granted. There is also a further charge for a cable purchased at Deal, which is evidently a debt for which a remedy must be sought elsewhere; there are also other disbursements which fall \*under the former objection, and must dispose of his whole [ \* 236 ] demand in character of master.

In support of the petition, *Swabey*. It was said, in *Clay v. Sudgrove*, Salk. 33, "that it was not reasonable that the master should sue for wages, where he commences the voyage as master." In this case it is a succession in a foreign port *de jure*, for the necessary service of the ship. In the case cited in *Strange*, it was a suit against the ship, in that respect materially differing from the present, as the ship has been already sold, on the proceedings of other parties; and our act is only against the proceeds. It has been frequently said in this court, that a distinction might be made, and that masters and

material men<sup>1</sup> also, by the indulgence of the court, may be allowed to be paid out of proceeds in the hands of the court, although they would not be allowed to proceed originally against the ship.

COURT. I could wish the cases to be looked into, respecting persons allowed to take money out of proceeds, who are not allowed to sue originally. I think what is said by Dr. Swabey is true,<sup>2</sup> that it has been allowed to material men, but the cases to which [ \*237 ] I refer, were cases in which there might be no \*person objecting, or where there remained an undisputed surplus after payment of the debt, which was the original cause of the suit.

*Arnold.* In this case the objection is taken on the part of the bottomry bond holder, who is not yet paid his debts.

#### JUDGMENT.

SIR W. SCOTT. It has been repeatedly decided that a master cannot sue in the Court of Admiralty for his wages; because he is supposed to stand on the security of his personal contract with his owner, not relating to the bottom of the ship, and, therefore, he has been prevented from suing here. A case has also been cited, in which a mate, who had become master during the voyage by the death of the former master, was also prohibited from suing in the latter character, his contract having been made only in the capacity of mate. If that case had not stood in the way, I might have been disposed to entertain this suit; because, having contracted originally as mate, and becoming master in consequence of subsequent events, it is still such a demand as might be taken to arise out of his original contract. His original contract being not only that he shall perform

<sup>1</sup> By material men, in the style of the Court of Admiralty, are meant the persons who furnish and construct the different materials of ships: ship-builders, rope-makers, &c., &c. See a learned argument of Sir L. Jenkins, before the House of Lords, on the competency of such persons to sue originally in the admiralty. *Life of Sir L. Jenkins*, vol. 1, p. 76.

<sup>2</sup> [In *The Neptune*, 3 Knapp, 94, such course was held illegal. *Post*, 239. Before the decision in *The Neptune*, 3 Knapp, 94, material men were allowed to sue for proceeds in court. *The John*, 3 C. Rob. 288; *The Neptune*, 3 Hagg. Ad. R. 129; *The Maitland*, 2 Hagg. Ad. R. 253. But it is held in the United States, under the grant of "admiralty and maritime jurisdiction," that even an original suit may be maintained therefor. *The Zodiac*, 1 Hagg. Ad. R. 325, n. And it is now granted in England in case of foreign ships by stat. 3 & 4 Vict. ch. 60. As to the jurisdiction of Admiralty Courts, to apply proceeds in court to claims not originally cognizable in admiralty, see *The Neptune*, 3 Hagg. Ad. R. 129, and *S. C.* on appeal, 3 Knapp, 94 note. Also *Leland v. The Medora*, 2 Wood & Min. 92; *Harper v. New Brig*, Gilp. 536; *Bracket v. The Hercules*, Gilp. 184.]

the duties of mate, but also, by necessary implication of law, that he shall, in case of necessity, take upon himself also the duties of master; for, by the maritime law, the mate is, *hæres necessarius* to the employment of master in case of necessity. It might, therefore, have been understood as a thing mutually understood in the original contract, and foreseen and provided for at the time, and in the act of forming it. The court might have been induced to [ \* 238 ] sustain such a suit, not under the view of a contract entered into by this man as master, but as a consequence arising originally out of the primary contract as mate, over which contract this court has an undoubted jurisdiction. But since it appears by the cases cited that the courts of common law have determined otherwise, and have granted a prohibition on this point, the petition must be reformed according to those determinations. But, excluding the *quantum meruit* due to him as master, he is still, I hold, entitled to proceed for his wages as mate; he must apply elsewhere for his *quantum meruit*, for those additional duties performed by him as master.

*Arnold* asked, Whether it was not the intention of the court that the demand of the petitioner, as mate, must end with the day of his appointment to the office of master?

COURT. My opinion is, that he is still entitled to his wages as mate, and that he must go elsewhere for the reward of the additional services performed as master. I consider his new character of master as superinduced to that original one of mate. He contracted to serve as mate, and it is a part of that contract legally implied in it, that he shall likewise act as master in case of the death or removal of the actual master; but I do not think that the character of mate is necessarily merged in that of master, or that his title to a mate's wages is totally extinguished by his acquired title to a *quantum meruit* for his additional service as master, unless it can be shown that the office of mate was regularly devolved upon somebody else, and the duties of it were entirely performed by [ \* 239 ] that other person. It is the inclination of the court to aid the present suitor as far as it can consistently with law, as it clearly appears that he has no chance of recovering elsewhere from an insolvent party.

In respect to the distinction taken between an original suit and a permission to be paid out of the proceeds, upon inquiry, no instance has been found in which a master has been permitted to sue against proceeds in the registry, except in cases of mere remnants and surplus; and not even then, if there have been any adverse interests opposing it.

THE PERSEVERANCE, Pittor, master.<sup>1</sup>

November, 22, 1799.

Amelioration of prize-ship, purchased by a neutral, under illegal condemnation in Norway.  
Allowance made, on restitution, to original owner.

THIS was a case of a ship that had been a British prize, sold under a sentence of condemnation in Norway to a Swedish merchant, and was seized, on coming to the Isle of Guernsey, on the part of the former owner. An appearance being given for the neutral purchaser, it was submitted, on his part, that if the vessel was to be restored to the former owner under the authority of *The Fladoyen*,<sup>2</sup> it was still but reasonable that some compensation should be made for considerable repairs, which the ship had undergone in the possession of the Swedish purchaser, to the amount of 205*l*.

## JUDGMENT.

SIR W. SCOTT. It is a general rule, undoubtedly, that [ \* 240 ] whoever purchases under an illegal title does it \* at his own peril, and must take the consequence (both in his purchase and in his own subsequent expenditure upon it,) of his inattention to his own security; but I think this was not a title so notoriously bad, at the time when this purchase was made, as to bring it fairly under the application of the general rule to its utmost extent.

The court has had occasion to inquire into the validity of such purchases, and has, upon a regular discussion, pronounced them invalid;<sup>3</sup> and if, henceforth, neutrals shall continue to purchase under such flimsy titles, they must take the consequences of their own imprudence. But it may be too much to apply this maxim, without any alleviation, to a person who has heretofore bought under a practice, which, though illegal, was too prevalent in some ports of the north of Europe. It appears that a sum of money has been expended on the repairs of this vessel, by which the claimant will be benefited,

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<sup>1</sup> [Affirmed on appeal, Aug. 10, 1803. *The Kierlighett*, 3 C. Rob. 100. For other cases of amelioration, see *The Nostra de Conceicas*, 5 C. Rob. 294; *the Fanny & Elmira*, 1 Edw. 117, 120; *Ridgway v. Roberts*, 4 Hare. 106; *The Sarah Ann*, 2 Sumn. 206.

<sup>2</sup> Vol. i. p. 135.

<sup>3</sup> [*The Fladoyen*, 1 C. Rob. 135 and note.]

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The *Isabella*. 2 C. Rob.

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though not to the amount of the sum laid out — something must be allowed for wear and tear; and besides, the party who has expended this sum, has had the use of the vessel in the meantime. I shall, therefore, not allow the whole sum, but I shall take a moiety, and I shall allow that, in consideration of the benefit which the original owners are likely to receive from the amelioration.

Sum asked 205*l*. Given 102*l*.

Ship restored to the former owner on salvage.

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• INSTANCE COURT.

[ • 241 ]

THE *ISABELLA*, Brand, master.

November 22, 1799.

Mariner's wages, ship's articles, to be signed before clearing officer, &c., to be conclusive.<sup>1</sup>  
Act 2 G. 2, c. 36; 2 G. 3, c. 31; 39 G. 3, c. 80, § 27. Demand of additional privilege, under custom of the trade, not allowed.

THIS was a case of a summary petition,<sup>2</sup> on behalf of the widow and representative of G. Carson, late chief mate of the said ship, to recover a sum of money due for wages, on a voyage from the port of London to the coast of Africa, &c., and from thence to the West Indies. The demand was for 26*l*., at the rate of 4*l*. per month, under agreement; and, beyond that, for 70*l*., as the value of a privilege of one slave, said to be a part of the agreement, and a privilege due under the ordinary practice of that trade, according to average price at the port of delivery.

Against the petition, *Swabey*. This mariner died before the slaves

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<sup>1</sup> [The *Prince Frederick*, 2 Hagg. Ad. R. 394; *Dofter v. Cresswell*, 7 Dowl. & Ryl. 650; The *Jack Park*, 4 C. Rob. 314.]

<sup>2</sup> The first article of the petition, pleading the hiring, stated "that the master, &c., did hire the said G. Carson, to serve as chief mate on board the said ship, at and after the rate or wages of four pounds the month, with the benefit of a slave, when the cargo was taken completely on board, in Africa," without any mention of the custom of trade; and the schedule annexed to the petition was, —

Wages, for six months and sixteen days	£26 5 6
To a slave, as per agreement, the value of which is 70 <i>l</i> . or thereabouts .	70 0 0

were delivered, on the passage to the West Indies; and, therefore, it is not clear that he would be entitled by the custom, if it was proved to exist. But, with respect to that part of the [ \* 242 ] demand \* for privilege, the parties are precluded, by their own showing, on other grounds; for it is stated to be under agreement, and yet it makes no part of the contract, as it ought to have done, under regulations of the old act, 2 G. 2, c. 36, made perpetual, 2 G. 3, c. 31, which have been again inserted in a late act, 39 G. 3, c. 80, § 27, respecting this particular trade; by which it is required that articles of agreement shall be signed "by the master, officers, and seamen, before the ship leaves port, which shall be conclusive, and no other form used."

If there was, in this case, any such privilege allowed, it ought to have been made part of the articles. That not having been done, it is a competent objection to take on the part of the estate of the defendant, who has since become a bankrupt, that the petitioner is precluded from this part of his demand on his own showing.

For the petition, *Sewell* said, That it did not appear that the regulations of the act were meant to apply to those things which are due under the ordinary custom of the trade, under which this privilege had been always enjoyed.

*Swabey*. If it is a custom, it ought to have been distinctly pleaded.

COURT. Instead of being pleaded as a custom, it is pleaded under the agreement; although I do not find, in the articles of agreement, one word of the general custom, nor the least mention of the privilege of a slave, as matter of special agreement. The general [ \* 243 ] act for the regulation and government of seamen in the merchant service, 2 G. 2, c. 36, made perpetual, 2 G. 3, c. 31, directs, "that if any seaman or mariner enter or ship himself on board any merchant ship or vessel, on any intended voyage for parts beyond the seas, he and they so entering themselves as aforesaid shall, and they are hereby obliged to sign such agreement or contract within three days after he or they shall have so entered themselves on board any ship or vessel, in order to proceed on any voyage as aforesaid; which agreement or agreements, or contracts, after the signing thereof, shall be conclusive and binding to all parties, any custom or usage to the contrary notwithstanding." I take it to have been the intention of the general act, as well as of the act lately passed, 39 G. 3, c. 80, § 27, for the regulation of this peculiar



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*The Isabella. 3 C. Rob.*

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trade to Africa, to render the agreement as distinct and definitive as possible, to prevent any part of it from resting in parol or vague conversation, which is at all times so difficult to be ascertained in a court of justice, and in no cases more so than in such as relate to the transactions of this class of persons. If there had been no such act, or if it had been less imperative, still the rule is no more than what the discretion of the court would have wished to apply to such a subject. The late act states,—“And for the better regulation, encouragement, and preservation of the health of the officers and seamen employed in ships or vessels trading to the coast of Africa for slaves, and from thence to the West Indies and America, be it further enacted, that from and after the first day of August \* next after the passing of this act, before any ship or vessel [ \* 244 ] shall proceed to sea, the master, officers, and mariners shall sign and execute articles of agreement and a muster-roll, in the presence of, and witnessed by, the clearing officer and one of the tidesmen of the port from whence the ship departs; and a duplicate of the articles of agreement and muster-roll, duly signed and executed, shall be delivered to the aforesaid clearing officer, in order to its being lodged with the proper officer, in the custom-house, according to the forms hereunto annexed; which agreement shall be conclusive to all parties for the time contracted for, and no other form whatsoever of articles of agreement, or muster-roll, shall be used, under the penalty of fifty pounds; one half to be paid to the use of Greenwich Hospital, and the other half to the informer, or other person who shall sue for the same, in any of his Majesty's courts of record.” That being the statutable rule, it is impossible to set up a demand of this collateral nature, which exceeds twice the amount of the principal agreement, and to support it on the plea of a customary right,—especially for a customary right which was so unknown, that the party himself was not sufficiently apprised of it, but pleads it as matter of special agreement. It is said, that the existence of such a privilege is proved by the terms of the wages,—the master and mate having less, by their agreement, than the ordinary mariners; but it is impossible for me to say, that because their wages are so small, that therefore this particular privilege of a slave exists. I may have my surmises that they might enjoy some other additional \* advantages; but it is impossible that I can [ \* 245 ] come to a conclusion that therefore this particular privilege of a slave exists, which so much exceeds the amount of the contract. If any such understanding prevails, care ought to be taken to insert it in the articles. I must reject that part of the petition.

Petition directed to be reformed.

## INSTANCE COURT.

THE FABIVS, Cowper, master.

November 27, 1800.

The Vice-Admiralty Courts in the West Indies have no jurisdiction over offences committed against revenue laws, out of their respective islands.

THIS was a case in which a material question arose, respecting the extent of the jurisdiction of the Vice-Admiralty Courts in revenue matters.

It was the case of an American ship and cargo, taken as prize, 18th February, 1798, by The Lark, privateer, and carried to New Providence, where she was restored by consent, February 25th. On the same day she was again seized by Captain Church, of his Majesty's ship of war The Topaz, lying in the harbor of Nassau, in New Providence, on suggestion that she had exported from Savannah-le-Mer, in Jamaica, her last clearing port, logwood, &c., in violation of the plantation laws of this kingdom. On this ground a libel of information was filed, and proceedings were regularly pursued in the Vice-Admiralty Court of New Providence, and the court pronounced a sentence of confiscation of the ship, tackle, and cargo, &c.

The cause was now brought before the High Court of Admiralty, on appeal from this sentence, on the part of the master, claimant of ship and cargo.

\* In support of the appeal, *Laurence* and *Swabey* argued, [ \* 246 ] on the merits, that the ship had gone into Jamaica, with provisions, &c., in consequence of a proclamation from the governor of Jamaica, and that the logwood had been weighed by the custom-house officer, and shipped with his privity and knowledge. They were proceeding farther to dispute the competency of a Vice-Admiralty Court to take cognizance of a breach of the revenue laws, committed without the limits of its local jurisdiction, and in another island, when the court stopped the argument.

COURT. I have a strong persuasion that there has been a determination on this point, and that it has been decided that Vice-Admiralty Courts have no authority to take cognizance of offences committed not within the limits of their local jurisdiction. I shall defer this cause, that an inquiry may be made into the precedents on this point.

On the 11th December, 1800, the cause came on again, when *Dr. Swabey* produced the case of *The Vrouw Dorothea*, Block, master,<sup>1</sup> determined before his Majesty's High Court of Delegates, at Serjeant's Inn, June 17, 1754. Present, Sir Michael Foster, Sir Sydney Stafford Smyth, Mr. Justice Gundry, Dr. Walker, Dr. Bettesworth, Sir Ed. Simpson, Dr. Collier, Dr. Ducarel.

[The facts of that case were, — That the *Dorothea*, a Dutch ship, from Amsterdam to Curacoa, was taken by *The Wager*, man-of-war, 26th August, 1746, and carried to \*Jamaica, [ \*247 ] where she was proceeded against as prize, and restored; after which the master petitioned the governor for leave to sell some part of his cargo, and, having sold part under his permission and the inspection of the naval officer of Jamaica, sailed from that port, but was driven back in distress, when he obtained permission to unload and careen, and sell a farther part of his cargo to defray his expenses. She again sailed, and on the 7th August, 1747, was again taken as prize by *The Trelawney*, privateer, and carried to Charlestown, where she was proceeded against as prize, and restored, with costs; but on the 7th December, 1747, as she lay off Charlestown, she was seized by W. Hopton, deputy naval officer, and proceeded against as forfeited, for having imported into, and exported out of, Jamaica, goods contrary to law. After the usual proceedings the ship was condemned, July 4th, 1748, and the master, Block, appealed to the High Court of Admiralty of England.

The libel of appeal was not in common form, but special, in objecting against the jurisdiction of the judge appealed from. "That a certain cause, civil and maritime, was unjustly brought before the Honorable J. Green, in Carolina, for a pretended breach not within the jurisdiction of the court." This objection was supported on the part of Block, the master, by an allegation, in which the character of the ship, and the previous circumstances of the voyage were set forth, and in which it was pleaded, "that in fact no such goods were imported or exported, and that if they had been imported or exported, no suit could be commenced on that act before the judge of the Vice-Admiralty Court of South Carolina, for a breach of the plantation laws \*committed at Jamaica; and that the judge [ \*248 ] of Carolina had no jurisdiction to condemn or acquit for any act done at Jamaica." The allegation was admitted, and exhibits produced, by which the facts were proved, but no witnesses were examined; and on the 12th July, 1751, the High Court of Admiralty

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<sup>1</sup> *Vrouw Dorothea, Block, Anno 1754.*

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The Fabius. 2 C. Rob.

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pronounced, "that the vice-admiralty judge of Carolina had no jurisdiction." From this sentence Hopton appealed to the High Court of Delegates, where the cause was elaborately argued, by the the King's Advocate, Mr. Murray, Attorney-General, Dr. Pinfold, Dr. Hay, and Mr. Pratt, for the appellant Hopton; and by Mr. Hume Campbell, Dr. Jenner, and Dr. Smalbroke, for the respondent Block.

By a note of the case (with which I have been favored by my learned friend, Dr. Swabey,) an objection appears to have been strongly pressed before the Court of Delegates, respecting the jurisdiction of the High Court of Admiralty to receive appeals from the Vice-Admiralty Courts on revenue causes; on the ground that they were not, in their nature, causes civil and maritime, and under the ordinary jurisdiction of the Court of Admiralty, but that it was a jurisdiction specially given to the Vice-Admiralty Courts, by statute 7 & 8 W. 3, ch. 22, s. 6, which did not take any notice of the appellate jurisdiction of the High Court of Admiralty in such causes.

This point was fully argued and determined,<sup>1</sup> and on the [ \* 249 ] 17th June, 1754, "The judges pronounced \*for the appeal, and complaint made and interposed on the part and behalf of Block, the master, to the High Court of Admiralty of England, from the judge of the Vice-Admiralty Court of South Carolina; and that the said appeal and complaint were made and interposed for causes true, just, and lawful. Wherefore the judges revoked the sentence of the Vice-Admiralty Court of South Carolina, and decreed restitution of the said ship, tackle, &c., and did farther condemn the appellant, Hopton, in the damages sustained and incurred by the owners of the said ship and her cargo, by the seizure and detention thereof at South Carolina; and did further condemn the appellant in costs of suit, as well in the first and second, as in this instance of the cause."<sup>2</sup>

On the production of this precedent, the *King's Advocate* took an exception that no fact of exportation appeared to have been stated in that case; and that there was a material distinction between the offences of importation and exportation, and the necessary modes of

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<sup>1</sup> The same point has since, I am informed, received the unanimous concurrence of all the judges, on a reference from the Privy Council. It was contended that the appeal more properly lay to the Privy Council, the general court of appeal in all plantation causes, and the Privy Council had entertained some few revenue causes from the plantations. The opinion of the judges was, that it lay to the High Court of Admiralty.

<sup>2</sup> From the register of the High Court of Delegates.

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The Fabius. 2 C. Rob.

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proceeding against them. That the former might be justly amenable only to the local jurisdiction of the island where it was committed, because it was fully within the reach of the court; but that the offence of exporting contrary to the statutes, could not be considered as complete, till the ship had actually got out of the port and out of the district of the local jurisdiction. That the authority of the case \* stated ought not to be carried farther than the facts of the [ \* 250 ] case, which did not appear to amount to a case of exportation. That it had fallen within his observation to see other cases in which the Vice-Admiralty Courts did proceed to take cognizance of frauds committed in other islands.

JUDGMENT.

SIR W. SCOTT. I have had occasion to observe that, too; and I am aware of some inconveniences that may possibly arise on either side. But if this point has been decided by the Court of Delegates — a court very ably composed — I shall not hold myself at liberty to look into the question of convenience. If inconveniences arise, they must be guarded against by provisions framed under an authority of a still higher nature. But it is very evident to me that the inconveniences would be ten times more intolerable if the cruisers could carry ships, charged with offences against the revenue laws, to any remote jurisdiction they might think fit. The injustice to which it might lead would be horribly oppressive to the individual. With respect to the distinction which has been taken between importation and exportation, I need say no more than that the sentence of the High Court of Admiralty, which was affirmed by the delegates, is “That the judge having heard advocates as to the jurisdiction of the judge appealed from, declared that the judge appealed from had no jurisdiction to inquire as to the importation or exportation of goods at Jamaica, contrary to the act of parliament.”

*Laurence* prayed interest.

\* COURT. I observe that the Court of Delegates did con- [ \* 251 ] demn in costs and damages. After that decision I am to consider it as clear and settled law that the Vice-Admiralty Court of New Providence had no jurisdiction whatever, and that the whole of the proceedings there were vexatious and null, and I think I am bound to decree costs and damages as the other court did when the matter was *res integra*, and might be thought a very fit case for judicial determination. I shall consider myself bound by the authority of that decision settled by such a court, after a very deliberate argument,

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The Susa. 2 C. Rob.

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and I shall follow the direction of that sentence in annulling the decree of the Vice-Admiralty Court of New Providence in this case, with costs and damages.

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THE SUSAN, Barzillai Hussey, master.<sup>1</sup>

December 30, 1799.

French whale fishery. Asserted American vessel. Effect of suppression of enemy's part interests.<sup>2</sup> Condemnation.

THIS was a case of an asserted American ship, taken on a voyage from Dunkirk to St. Ubes, in ballast, with an intention of proceeding with a cargo of salt, as it was contended on the part of the captors, to the French south whale fishery; but as it was represented on the part of the claimant, on an ulterior voyage only from St. Ubes to New York.

For the captors, *King's Advocate*, and *Advocate of the Admiralty*. This vessel was taken going, under American colors, from Dunkirk to St. Ubes, with an intention of proceeding afterwards, as it is asserted, to New York, and it is claimed for Mr. Mark Coffin, of Nantucket.

There is the original measuring bill on board, bearing date [ \* 252 ] New Bedford, July 4, 1795, in which B. Hussey is \* described as master. But there are two subsequent indorsements, one at New Bedford, 23d July, 1796, by the collector, "Isaiah Hussey having taken the oath required by law, is at present master of the within vessel in lieu of B. Hussey, late master;" and another at Dunkirk, 31st January, 1797, by the American consul: "B. Hussey having taken the oath required by law, is at present master of the within vessel in lieu of Isaiah Hussey, late master. Signed C. F. Coffyn, consul for the United States of America." It is clear, therefore, that both the Husseys have been concerned in this vessel in her previous occupation, whatever that may turn out to have been. She appears to have been a French built vessel, engaged in the south whale fishery, and on those voyages returning to Dunkirk.

The account which the master gives of her former occupation is, "that the ship, since the deponent has belonged to her, sailed from

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<sup>1</sup> [Affirmed on appeal, March 19, 1803.]

<sup>2</sup> [The *Enrom*, 2 C. Rob. 1, and note.]

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The *Susa*. 2 C. Rob.

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New Bedford on the whale fishery, and then returned to New Bedford, and afterwards sailed with the same cargo to Dunkirk, and there delivered it to Messrs. Brothers Dubaeque, merchants there, and then sailed from Dunkirk on the whale fishery, and returned with the produce to Dunkirk; and there delivered it to the said Brothers Dubaeque, in or about the month of May, 1798, and continued there till the 18th day of July, when she sailed on the present voyage," proceeding, as we submit, on a similar ulterior destination to the whale fishery. On these grounds it is submitted that a domiciled French character is stamped upon this vessel by her employment, be the property in whom it may. But many circumstances that appear "in these documents, and in the management of [ \* 253 ] the vessel, show not only strong marks of a voyage back to Dunkirk, in the same course as before, but also afford great reason to suppose that the actual property of this vessel belongs to persons resident at Dunkirk. She is professedly going to America under the command of B. Hussey, appointed by these persons, as it is expressed, "for and in the name of the owners." The terms are, "that he was to receive from the owners or their agents, 30 Spanish doubloons per month, and five per cent. for all freight she should make, whether laden on owners' or transient account, and an allowance of 2s. 6d. per day, all the time the ship is in port, Dunkirk excepted." The former part of these terms, are not like the terms for a voyage homeward to the port of her owners; and the latter exception clearly shows that every other port was a foreign port in which an extra allowance was to be made, and that Dunkirk was in truth the home port, in which this allowance was to cease. The last article of this agreement is, "that these articles are to stand for the ship *Susa's* present voyage from Dunkirk round to New York, and back to a port in Europe, when they shall either be continued or altered as the owner or captain may judge convenient. Signed for and in behalf of owners, J. Dubaeque, B. Hussey." These passages strongly prove that the real interest resides at Dunkirk. From papers in a former cause, the *America*, in which the name of Coffin appeared as the claimant, it appeared also that he and Hussey were persons living at Dunkirk, and engaged in the south whale fishery. On all these grounds it is submitted that this vessel would be subject "to [ \* 254 ] condemnation, even as an American ship, from her adopted character, but that, in reality, she has even more than an adopted French character belonging to her, and is, on all these grounds subject to condemnation.

For the claimant, *Arnold* and *Crooks* contended that it was not

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necessary to advert to the former voyages of this vessel, or to say what would have been the legal effect if she had been taken in one of them, as it is clear that the former occupation had ceased; that there had been a cessation of above a year, and that there was no reason to suppose she had again resumed that trade. That the terms of the ship's articles were different from those on whaling voyages, which generally included some proportion of the success of the adventure, and that no fishing tackle was found on board; neither was there any intimation that she was to touch anywhere to take in any such articles. It was submitted that the suspicion drawn from the attempt the ship was making to touch at Calais, was fully answered by the necessity she was under of landing the Dunkirk pilot, which she had before been prevented from doing by adverse winds. In respect to the papers invoked from the *America*, it was said that the facts and persons in that case were wholly different. That the claim was given, not for Mark Coffin, but for Sh. Coffin, although the name of Mark Coffin was introduced by some mistake into the cause. That that vessel was taken on her return to Dunkirk, and the witnesses swore she belonged to persons at Dunkirk.

The COURT asking whether there was any paper to connect the property of the vessel with Coffin since 1795, a letter was produced from Mark Coffin to J. Hussey.

"Respected Brother, Isarat Hussey, — I have lately heard of thy misfortune, of being taken and retaken, and carried to Liverpool; and further, that thou intended to sell thy ship, and proceed to Hamburg to pursue the first capture for damages. If thou shouldst go to Dunkirk, assist to get the ship *Susa* to America; she has been lying there nine months, and cannot sail on account of the strictness of the French laws respecting the muster-roll. Send her in ballast, or with a loading of salt; but do not take goods of the manufacture of France, as the laws of America do not admit them to an entry. Perhaps thou may wish a passage home in her; if that should be the case, I should be very glad thou wouldst take thy passage in her, and give her some freight, if thou can, — but, as I mentioned above, our laws still continue as to French goods.

"*Nantucket, March 2d, 1799.*

"MARK COFFIN."

#### JUDGMENT.

SIR W. SCOTT. This is the case of a ship which was taken under American colors, on the 19th July, 1799, on a voyage from Dunkirk to St. Ubes, in ballast. The ship is claimed for Mr. Mark Coffin, of New Bedford, whose name has, by some means or other, appeared



in the Court of Appeal in a transaction very much resembling the present, at least in exterior form and shape. In that case the name of Mark Coffin was used by persons carrying on the whale fishery of France, without having any footing in America, or any visible thread of connection with it; but carrying back the produce to France, and supplying \* the manufactures and industry of France, [ \* 256 ] without any communication or intercourse whatever with America. It did appear to the Superior Court, as it always appeared to this court, that persons carrying on such a trade were just as much to be considered as incorporated in the commerce of France, as if they were native merchants of France; and that their property, so employed, would be justly subject to confiscation, be their personal residence where it might. The other actors of that drama were exactly the same as those that appear in this case. There were the same names of Coffin, the Husseys, and Dubaeque, the proprietor. Such a coincidence could hardly happen, unless the same names, in both cases, do in reality belong to the same persons engaged in similar transactions. At any rate it is an awakening circumstance, which calls upon the vigilance of the court, to examine minutely into the facts of the case, and into the proofs of property that are brought forward.

In the first place, the ship is French built, first seen at Dunkirk, and employed in the south whale fishery. The master represents the former trade "to have begun from New Bedford;" the counsel have put it on better grounds; yet, the utmost to which they can bring the case is, that it had generally been to France, but that that course of trade was now abandoned, though for the first time.

If that were the case, and I was satisfied, by the evidence in the cause, that the ship was the property of Mark Coffin, and of him only, I should hold myself bound to restore; but if, on the other hand, it should appear that there are other owners, with a joint \* interest, and those persons originally domiciled in [ \* 257 ] France, or returning from thence, after having lived so long there as to lie under a suspicion of being liable, from that residence, to be treated as French persons, I should hold such a claim fraudulent; inasmuch as the suppression of such names would be a fraudulent suppression, and, being so, would justly subject the property in question to condemnation. I allude to the Mr. Husseys, whose residence in France is, at least, questionable, and very sufficient to provoke the question, whether they are to be pronounced to have left that country, and to be pure American characters, without any strong intermixture of French interest adhering to them. If I am satisfied that the claim is incorrect, in leaving out other French per-

sons, or these Mr. Husseys, (on whom, at any rate, a strong taint and suspicion of French character attaches,) with an intent of disguising their interest from the court, I shall consider it to be my duty to reject such a claim altogether, as not erroneously, but fraudulently incorrect. Amongst the papers there is clearance, on the affirmation made by Mark Coffin, in which he is represented as the owner; but other papers speak of a plurality of owners. The agreement between Dubaeque and the master speaks of "the owners and their agents;" and when I am given to understand that this master is the brother-in-law of Mark Coffin, it appears to be a singular mistake for a person so intimately connected with him to fall into; and amounts as nearly to a contradiction as any positions can do, that are not standing in direct verbal opposition to each other. The master says

"that Mark Coffin is the sole owner;" but here again the [ \* 258 ] \* depositions are more at variance than the papers. For I find the mate, speaking on the authority of the master, says "that there are other owners besides Mark Coffin; that he has heard and believes that the said master, together with two of his brothers which were on board the said ship, one as a mariner, the other as a passenger, or some one of them, were owners of the said ship at the time she was seized;" and, to the thirtieth interrogatory, "that the master, at the time when this deponent was shipped, declared to this deponent that he, the said master, and his said brothers, were the real, true, and only owners of the said ship." These are strong and emphatical words; and taking it to be as held out, that Coffin has an interest in her, still they would go a great way to show that there are other owners. If I credit this man, and his right apprehension of the matter, I must hold these persons to be the true owners. And it is to be observed that the mate has no temptation to misrepresent. He is in a situation of some confidence, and appears totally disinterested, and gives a testimony, as far as I can judge, free from all imputation; whilst the deposition of the master bears strong marks of what is called mistake, but what other persons must term a very disingenuous manner of delivering a testimony. There is, besides, an observation arising on the affirmations of these Husseys, that, though they come from persons described as Quakers, and, as such, allowed to have their affirmations received in this and other Christian countries, where that persuasion of men is admitted, yet the same persons are certified by the consul at Dunkirk, and by

[ \* 259 ] another person, the collector of the customs in America, \*as having, on other occasions, taken an oath. It is impossible for me to presume such an inaccuracy in public instruments; and, therefore, with all the respect that is due to religious tenderness of

mind, this variance cannot but raise inferences to their disadvantage. It must be allowed, at least, that there is something in this disagreement that calls loudly for explanation ; and when I look at the disingenuous account which the master has given of his former voyage, stating it to have commenced from New Bedford, though I am satisfied it began from Dunkirk, and nowhere else ; when I see the same insincere account of the destination of the present voyage, not only in the clearance, but in the deposition of the witnesses, stating it to be "direct for New York," as if there was no real design of visiting St. Ubes ; it is impossible for me, so left, to pick the truth out from people who will not tell it themselves, to do otherwise than draw inferences strongly to their disadvantage.

If the court was to attend merely to the balance of credit, it would be bound to give credit to the mate, when he says that the master told him "he and his brothers were the sole owners." It is impossible for me to find a solution for it in mere misapprehension ; it could not but be understood in the terms in which it was delivered. There is, besides, something in the agreement that points strongly to an interest in these Frenchmen. If the Husseys, who are the brothers of Coffin, had the direction of the vessel, and she was actually quitting Dunkirk, how comes it that Mr. Dubaeque is entering into an agreement with the master, "for the owners and their agents?" It has been made to appear, by a \*letter [ \* 260 ] that has been produced late in the cause, that J. Hussey had the care of the ship committed to him by Mr. Coffin ; but how does this agree with the appointment from the hands of these French merchants ? How happened it that they should regulate the whole transaction after that, and that they should assume the power of settling every thing respecting the concerns of the ship, and, most manifestly, providing for her return to Europe ? All interference on the part of Mark Coffin is entirely excluded ; and the whole matter is to be settled between the master and these French merchants in Europe.

Upon the whole, I cannot help saying that these are great difficulties ; and although it is said that Mr. Mark Coffin does not appear to have been implicated in this part of the transaction, and though it is possible that they may have been thrown on the case by the manner in which the party's agents in Europe have conducted themselves, and that they might have admitted of explanations if the whole truth had been ingenuously set forth, still, as the matter is now represented, it is loaded with difficulties. The ship is claimed for Mr. Mark Coffin, as the sole proprietor, although the evidence of the case strongly shows that there are French interests behind, which

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are not sufficiently disclosed. I have already said what the consequence of that would be; if the parties are dissatisfied with my judgment, they must take the opinion of a superior court, if they think they can make out a more consistent history. But, on the evidence by which I am to determine this case, I think myself warranted to condemn this ship.

[ \* 261 ]

## \* INSTANCE COURT.

## ROBINETT against THE SHIP EXETER.

December 10, 1799.

Suit of mate for wages. Defence, that he had been discharged for misconduct. Sufficiency of defence not allowed, on proof of facts. Wages decreed, &c.<sup>1</sup>  
 [The master not admissible as a witness for his owners.]<sup>2</sup>

THIS was a case of a suit for wages, &c., against the ship *Exeter*, on behalf of Robert Robinett, who had been hired as mate in the service of the ship in Bombay by the captain, and was afterwards, in prosecution of the voyage to Europe, forcibly discharged by him, from the service of the said ship, at the island of Columbo; on a charge of incapacity, drunkenness, neglect, and disobedience of orders. The demand was for 127*l.* as the balance of wages and expenses incurred in returning to Europe.

## JUDGMENT.

SIR W. SCOTT. This is a suit brought by an officer of a ship, in the East India service, for his wages; and it has been observed in the defence, that in this respect, officers do not come before the court with so strong a title to the indulgence and favorable attention of the court, as common mariners; who are, from their ignorance and helpless state, placed in a peculiar manner under the tender protection of

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<sup>1</sup> [As to what will be justifiable cause for a discharge, so as to work forfeiture of wages, *The Elizabeth*, 2 *Dod.* 406; *Smith v. Treat*, *Davies*, R. 266; *Orne v. Townsend*, 4 *Mas.* 541; *Wilson v. The Mary*, *Gilp.* 33. Rights of sailors, when wrongfully discharged, *The Frederick*, 1 *Hagg. Ad. R.* 218; *The Elizabeth*, 2 *Dod.* 406; *The Beaver*, 3 *C. Rob.* 92; *Ex parte Giddings*, 2 *Gall.* 58; *Veacock v. McCall*, *Gilp.* 329. As to forfeiture of wages by misconduct, see note to *The Lady Campbell*, 2 *Hagg. Ad. R.* 5.]

<sup>2</sup> [*The Fortitude*, 3 *Sumn.* 228.]

the court. But there are other grounds on which officers are justly objects of equal attention, inasmuch as an injury done to their character is of wider extent, and is attended with consequences of a more \*serious nature; mariners, if distressed in one ser- [ \* 262 ] vice, may easily obtain another, and a sailor may remain a sailor to the end of his days, as it is not usual to be minute in the inquiry made into their characters. But if an officer is discharged for insufficiency, it may not be easy for him to procure another situation; and he is in danger of losing, not only his present footing, but more particularly those prospects of promotion, which depend in a great measure on the character that has travelled along with him during his former employs, and has been the most valuable fruit of a life of service. These considerations are sufficient to place officers also under the particular protection of the court. At the same time this must not be so understood, in either case, as if the court would show such a blind indulgence, as should overrule the real justice of the case; it is only such an indulgence as the equitable considerations of public utility require, which can seldom in such cases, any more than in others, be separated from particular justice.

In this case the officer was hired in Bombay, to proceed in the service of the ship to London; there is no difference about the agreement or terms of service. But it is alleged in the defence against this demand, that the service was not performed; on the other side it is said, that he was at all times ready to discharge his services till he was forcibly removed, which is to be considered in law as equivalent to the discharge; and on the part of the master, this act of removal is justified.

The question before the court will be, then, to decide whether the charges are of a sufficient nature to support this refusal, and whether they are supported \*by sufficient evidence. In the [ \* 263 ] first place, I observe, there is no general incapacity set up; such a charge is introduced into the deposition of Captain Whitford, indeed, but it makes no part of the plea. If a general incapacity had been specially pleaded, and properly supported by the depositions of the master; this court would find a difficulty in opposing the presumption, arising from the opinion of a superior officer. If that had been pleaded in the allegation, it must have been strong evidence that would have induced the court to determine against such a testimony. But if that had been pleaded, Mr. Robinett would have had an opportunity of defending himself; and he might have called forward the judgment of the former master with whom he sailed, and by whom he was recommended to Captain Whitford, as well as that of others who were acquainted with his talents; as that has not been

done; as this charge of general incapacity has not been put in issue in any manner, and consequently Mr. Robinett has had no notice to defend himself against it, I must leave it entirely out of consideration, and confine myself to the specific articles, charging him with drunkenness, neglect of duty, and disobedience. These are certainly offences of a high nature, fully sufficient to justify the discharge, if proved. In respect to the negligence, it would not be necessary to prove that it was wilful negligence; it would be sufficient if it appeared to amount to that habitual inattention to the ordinary duties of his station that might expose the ship to danger; for the person in Robinett's station stipulates against such negligence.

[ \* 264 ] \* Upon the matter of drunkenness, the court will be no apologist for that; it is an offence peculiarly noxious on board a ship, where the sober and vigilant attention of every man, and particularly of officers, is required. At the same time the court cannot entirely forget, that in a mode of life peculiarly exposed to severe peril and exertion, and, therefore, admitting in seasons of repose something of indulgence and refreshment; that indulgence and refreshment is naturally enough sought by such persons in grosser pleasures of that kind; and, therefore, that the proof of a single act of intemperance, committed in port, is no conclusive proof of disability for general maritime employment.<sup>1</sup> Another rule would, I fear, disable many very useful men for the maritime service of their country.

As to disobedience to lawful command, it is an offence of the grossest kind; the court would be particularly attentive to preserve that subordination and discipline on board of ship which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it. It would not, therefore, be a peremptory or harsh tone, or an overcharged manner in the exercise of authority, that will be ever held by this court to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually takes place on other occasions, and might be wished, generally, to attend the exercise of authority. The nature of the service requires, that those persons who engage in it should accommodate themselves to the circumstances attending it;

and those circumstances are, not unfrequently, urgent, and [ \* 265 ] create strong sensations, which naturally find their way in strong expressions and violent demeanor. The persons subject to this species of authority are not to be capacious, or to take

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<sup>1</sup> *The Maba*, 2 Hagg. Ad. R. 168.

exception to a neglect of formal and ceremonious observances of behavior; and on these grounds the court would hold, that the charges of this defence are of a nature sufficient to justify dismissal, if they are properly substantiated in evidence; although it might at the same time be proved that less personal civility had been used than would excuse something of an hesitation of obedience in other modes of life.

The next question will be, what is the evidence? And, on this point, it is unfortunate that Mr. Whitford is the only witness examined on the part of the defence. At the utmost, Mr. Whitford can only have become competent to give evidence in this case, by having become a bankrupt; and he may have exposed the property of his owners to danger, by not having taken the precaution to do, what ought always to be done, in a matter so tender as the discharge of an officer,—to call the attention of the passengers and crew to the circumstances attending it, that the propriety of the act may be properly warranted, and vouched by as much evidence as possible. This not having been done, Captain Whitford is the only witness on that side; at any rate it must appear, that he would have an interest to defend the propriety of his own conduct; if unopposed, the court would be inclined to presume in favor of authority, such being its proper and legal inclination; but opposed as he is, in this case, by two witnesses, who are not affected by any interest, or otherwise liable to objection, it would be difficult to take his single evidence in opposition to their united testimony. But \*the [ \* 266 ] matter does not rest on the credibility of these witnesses; an objection has been taken to the competency of Captain Whitford; and although I permitted his evidence to be read, *de bene esse*, reserving the objection, it was not from any doubt entertained, but because I wished to give it farther consideration. The objection taken, is to the conclusion drawn from the 13th and 14th articles of the allegation on the part of the defence which plead:

“13th, That the said ship Exeter, together with her tackle, apparel, and furniture, hath, since her arrival in the port of London, from her aforesaid voyage, been sold by the decree of this court to discharge the claims of the officers and mariners belonging to her for their service on board the said ship during the aforesaid voyage; that after payment of the just and legal claims of the said officers and mariners, there will remain about the sum of 4,000*l.* as the balance of the proceeds. That there were just and legal claims of bottomry and other bondholders on the said proceeds to the amount of 6,000*l.* and upwards, and on whose behalf such proceeds have been arrested. That two of the said bonds amounting respectively to the sum of

1,250*l.* and upwards, including interest, were given by the said Captain Whitford upon the bottom of the said ship, as a security for money advanced at the Cape of Good Hope, in the prosecution of her aforesaid voyage, and are entitled to a priority of payment to the other of the said bonds, which were given as a security for money previously advanced at Bombay, and have been so paid accordingly.

That by payment thereof the balance of the said proceeds [ \* 267 ] had been reduced to \*about the sum of 1,500*l.* being all that will remain for the discharge of the said last mentioned bonds, which amount together including interest to the sum of 3,500*l.* or thereabouts."

"14th, That the said Richard Whitford, late commander and two-thirds owner of the said ship Exeter, hath, since the arrival of the said ship in the port of London, been declared under the great seal of Great Britain a bankrupt; and having conformed himself in all respects to the several acts of parliament relating to bankrupts, on or about the 20th day of October last past, duly obtained his certificate, under the aforesaid seal, and was and is thereby exonerated from all claims and demands whatever, which arose prior to the date of the said certificate. That by reason of the premises, he, the said Richard Whitford, was and is a legal and competent witness to be produced, sworn, and examined in this cause."

Personally exonerated he certainly is, but not exonerated as to the estate, about which he is still liable to be examined. He has an interest still remaining as to the surplus of the estate, and also as to the allowance which will depend on the payment that is made; till he has done more, therefore, than he has yet done; till he has released all interest under the estate, and also the allowance; I have no doubt, upon the consideration which I have been able to give the matter, and also on conversation with eminent persons at the common law, that he is not a competent witness. Unless the defence, therefore, can be sustained on Mr. Robinett's own witnesses, there is an end of this suit. How do they depose?

[ \* 268 ] \* As to his general conduct, Mr. Urquhart, who was one of the officers of the ship, says, "That during all the time the said Robert Robinett continued on board the ship, saving the time he was confined in his cabin, as herein-before set forth, he did well and truly perform his duty as second mate, and was obedient to all the lawful commands of the said Richard Whitford the master, and other his superior officers on board;" and the second witness speaks in the same terms, and adds, "that he appeared always ready and willing to perform his duty." As to the charge of drunkenness, the first witness says, "he never saw any thing of the kind;" and the



second witness, "that he never saw him in liquor but on one occasion, on Christmas-day, whilst the ship was lying at Bombay;" this single instance is not, I think, sufficient to support the charge. I must observe, too, that this witness, Eshington, was the steward of the ship, and that it was part of the interrogatory addressed to him, "whether Robinett was not importunate to him for liquor; and whether he did not complain to Captain Whitford, that the said Robinett was always applying to him for an extraordinary quantity of wine and spirituous liquors;" to all which he answers in the direct negative, and says, "that he never did apply to him for more wine and other liquors than other officers were usually supplied with; and that he, the respondent, never did make any complaint to Captain Whitford on that score;" then, how is it possible to support this charge?

Next, as to negligence, it is not immaterial to observe, that in the note of dismissal from Captain Whitford, the only act of negligence specified, is the "omitting to take in the yawl, [ \* 269 ] and by that means suffering some Lascar sailors to desert; this was all that was specified, and it does rather induce a belief that this was all that was taken notice of at the time, and that the rest has been called in aid as subsidiary matter, to make out the charge. Then what are the acts of negligence? The first instance of neglect is charged in these words, "That whilst the said ship Exeter was off the gulf of Manora, in the prosecution of her voyage from Bombay to Colombo, the said Robert Robinett, who was the officer upon watch, notwithstanding it was obvious a squall was arising, neglected to take in her sails, as was his duty to have done, but suffered her to proceed in full sail; that upon Captain Whitford coming on deck, he expressed great displeasure towards the said Robert Robinett, for such his negligence, and said to him, if he were ignorant of his duty himself, he might have seen what was necessary for him to do by the ship Nottingham, which was sailing in company with the said ship, and had then taken in all her sails; that notwithstanding every exertion was then used by the order of the said Captain Whitford to take in the said sails, the topsails had been (owing to such the negligence of the said Robert Robinett,) nearly carried away by the squall coming on before they could be lowered." On this article Mr. Eshington says that he cannot speak, not being a judge of nautical matters, and having been, besides, below during the time inquired of; and Mr. Urquhart, though he confirms the fact, except as to the danger of the topsails being carried away, \* says, [ \* 270 ] "That he did not consider Mr. Robinett to have been guilty of any acts of negligence in the course of the voyage, or to have

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betrayed any want of nautical skill." This is all that is said; and I need not add that it is impossible for me to pronounce that the charge of neglect in this article is sustained on such evidence. The next charge is of losing the boat, and suffering five Lascar sailors to desert. It is charged in the allegation, "That the said Robert Robinett, whilst he was in charge of the said ship Exeter, as the superior officer on board, when she lay at Colombo, on or about the 13th day of February, 1797, left her long-boat at the buoy of an anchor parted with some days before, together with five Lascars belonging to the said ship, in her; that at day light the next morning it was discovered, that the said five Lascars had deserted with the said long-boat, a hawser, and three large tackles; that it was five or six days before the said long-boat was again found, when she was found at Point de Galle, much damaged, and the hawser and tackles had been taken out of her, and were totally lost; that the said Lascars were never afterwards discovered, nor did they, or either of them, ever return to their duty on board the said ship." On this article the witness Urquhart says, "That although Captain Whitford did blame the producent for leaving the long-boat in charge of the Lascars, that he never heard any other officer on board impute blame to the producent

Robinett on that account, neither did he consider him to [ \* 271 ] be blamable;" and the second witness says, "That \* the said Robinett was not considered as grossly negligent in losing the long-boat, by the deponent, it not being his duty to be on board at that time." I cannot say that the fact of imprudent conduct, or of negligent conduct, is in any way fastened down on him in this instance.

The next charge is that "whilst the said Robinett was in charge of the ship as superior officer on board in Colombo Bay, he one night neglected to have the yawl hoisted in, as it was his duty to have done, by which means seven other Lascar sailors went on shore and deserted." To this the witnesses say, "that although it might have been proper to hoist in the yawl at night, as it is usually done, that it is not an invariable rule."

The next instance of neglect is, "That the said Robert Robinett, whilst he was in charge of the said ship Exeter, as the superior officer on board as she lay at Colombo, on or about the 14th day of the said month of February, 1797, let go a second anchor; that Captain Whitford, the commander, when he came on board the said ship on that day, observed that the same crossed the cable by which the said ship was originally riding, and ordered the said anchor to be immediately weighed. That the said cable upon its coming in, was found so much chafed from want of proper service on it, as to render it

absolutely necessary to cut it off about ten fathoms from the clinch. That it was the duty of the said Robert Robinett, as the officer in charge, to have seen that proper service had been put on the said cable, and that he was guilty of a gross act of [ \* 272 ] negligence on such occasion, and thereby greatly endangered the safety of the said ship, and the property of the owners. That if the said ship had sustained any damage by the breaking of the said cable, arising from its being chafed as aforesaid, the underwriters would have been exonerated from payment thereof under the policy of insurance." The only witness that speaks to this article is Urquhart, and the account which he gives is very material. He says, " That it was the duty of Robinett, as the officer in charge, to see that proper service was put on the cable, which he believes was done at first; but as the producent Robinett was then the only officer on board except the chief mate, who was confined by the captain, and this respondent, who was ill, it was impossible for him to pay constant attention to the cable, and the accident of the chafing was owing to the inattention of the black gunner who was in charge thereof, whilst the producent went to sleep." Adverting, as I must always do, to the circumstance of Mr. Robinett being the only officer on board, and to the surplus duty that he had to perform in consequence of being so; and finding that the black gunner was on that account appointed to assist him, and that the chief imputation thrown on him was, that he did not see that the black gunner did his duty whilst he went to rest, it is impossible to say that this person is affected with the charge of negligence on this account.

I come next to the charge of disobedience, which I have said is of a very malignant nature in the eye of the court, [ \* 273 ] and which the court would upon every consideration be disposed to discountenance. But the only command upon him that I see which was disobeyed, was an order to leave the ship. And although I do not say that a master has not a right to give a discharge, and if the person so discharged refuses to quit the ship, that he might not turn him out, being responsible for his conduct in so doing; yet this must always be understood to be subject to responsibility on the question of propriety of the discharge; because it could never be maintained in the English maritime service, that if a master chose to turn a mariner on shore, without cause, in a foreign country, the mere refusal to go would of itself justify an improper discharge. The propriety of the refusal in such a case must depend entirely on the propriety of the order, and that must depend almost entirely upon its necessity, for little less than absolute necessity is required to bear out such an order. That a person should be a little averse to be turned

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ashore on this remote island, which though in English possession, is in truth a Dutch settlement, cannot be matter of surprise. It is easy to say that it was his duty to obey and fight his way home, and seek redress from a court of justice here; but that the person should feel a little unwilling to be turned adrift in this remote and foreign settlement is not to be wondered at, and I cannot think his expressing a disinclination can be considered to constitute an offence of mutiny or positive disobedience.

On the whole, I am of opinion that the evidence of Captain Whitford is not admissible, and that on the evidence of the other [ \* 274 ] witnesses I am in no degree warranted to say that the charges set up as the defence to this suit are made out. I must, therefore, pronounce for the demand of wages, and the expenses which have been incurred in the course of this suit to recover them.



### THE CAPE OF GOOD HOPE and its Dependencies.<sup>1</sup>

December 10, 1799.

Claim of joint capture, by East India ships carrying troops to the Cape of Good Hope, and asserting to have contributed to the capture by intimidation occasioned by their appearance, not allowed.<sup>2</sup>

Nature of the association by which transports can entitle themselves as joint captors.

THIS was a case of an allegation given on the part of the Admiralty, claiming an interest in the capture of the Cape of Good Hope, in virtue of several non-commissioned East India ships asserted to have assisted in that enterprise.

In support of the allegation, the *Advocate of the Admiralty* and *Laurence*. It is scarcely necessary to call the attention of the court on this question to any other evidence than the letter<sup>3</sup> of Lord Keith, written *in recenti facto*, which acknowledges in the fullest

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<sup>1</sup> [Affirmed on appeal, May 24, 1802.]

<sup>2</sup> [See note to *The Nordstern*, 1 Acton, 128.]

<sup>3</sup> "To the officers and seamen of the honorable company's ships in Symons Bay.

"However unnecessary it may appear to true Britons to thank them for services rendered to their country, yet the particular situation of the admiral must excuse his doing so, because he feels himself personally obliged by the ready attention of the officers and seamen of the India ships in assisting their brethren so essentially, as greatly contribute towards the fortunate event of the reduction of this valuable colony.

Monarch, Symons Bay, 16th September, 1795."

\* terms the services of these ships, and the great assist- [ \* 275 ]  
ance they afforded towards the reduction of the colony.

The terms of this letter are so strong, and go so directly to support the substance of the demand, resulting from the actual assistance afforded by these ships, that it is hardly necessary to detail more at large the nature of the services, and the particular advantages that were derived from them. The immediate effect of their assistance will be found, however, stated more particularly in the letter written from General Craig, in these terms: "On the one hand, as the enemy appears numerous and disposed to an obstinate defence, for which they had ample time to make the best preparations, I could not but be sensible that the force under my command was, in point of numbers, inadequate to the attempt of reducing them." And again, "In a conference with Sir G. Elphinstone, on the 2d of September, it was agreed to wait six days longer for the possibility of the arrival of General Clarke, and that if he did not appear by that time, I should then advance under every disadvantage of numbers and situation; try the fortune of an attack, which, however hazardous, we deemed it our duty to make before the total failure of our provisions put us under the necessity of seeking a supply elsewhere. On the morning of the third, however, the enemy, encouraged by the little success which had attended our attempt on the first, meditated a general attack on our camp, which, in all probability, would have been decisive of the fate of the colony. They advanced in the night with all the strength they could muster, and with a train of not less than eighteen field pieces; some movements which had been

\* observed the preceding evening had given me a suspicion [ \* 276 ] of their intention, and we were perfectly prepared to receive them. They were on their march, and considerable bodies began to make their appearance within our view, when at that critical moment the signal for a fleet first disconcerted them, and the appearance of fourteen sail of large vessels which came in sight immediately after, induced them to relinquish their enterprise, and retire to their former posts." It is still farther material to observe that the effect of this arrival was not matter of accident merely; the ships sailed from St. Salvador, on this particular enterprise in consequence of the immediate application of General Craig, sent from the Cape to St. Salvador, on the coast of Brazil, for the express purpose of hastening the arrival, as he did not think it prudent to begin the attack on the settlement of the Cape till he was reinforced. These facts being established beyond contradiction by the acts of the commanding officer, do, it is submitted, amount to that proof, which in ordinary cases of claims on the part of non-commissioned ships, is required of them to make out their case. The *onus probandi* being taken off

from them, and the facts being supplied by the captors, it becomes a case not merely of constructive service, but of actual assistance; and the only question is, how far it will in law entitle them to share. By analogy to former cases it comes within a recognized principle; for this court has gone so far as to allow non-commissioned ships to share in cases of actual assistance. In the case of *The Twee Gesusters*,<sup>1</sup> Cooman, in the last war, the act of joint chasing was allowed to amount to this assistance, although the non-commissioned [ \* 277 ] ship did not come up till after the capture had been effected. In the case of *The Le Franc*<sup>2</sup> also, the non-commissioned ship was allowed to share; and therefore the principle of law being admitted that associated actual services are of a competent nature without a personal interposition in the act of capture, it can hardly be denied that the acts of assistance rendered in this case are sufficient to entitle the parties to the application of it. It is admitted that one of the ships, the *Bombay Castle*, is entitled to share, as having been detached on a particular service, to make a diversion the side of Table Bay. But it will be difficult to make this admission without allowing the whole claim, because it was only by means of a draft from each of the other ships, of twenty men, by order of Lord Keith, that this ship was enabled to act. And the manner of making this draft goes strongly to show the character in which these ships were received; for it was made not in the manner of volunteering merely, but under an order from Lord Keith, directed to Captain Rees, the commanding officer of the East India Company's ships, to supply the necessary men. It had been before intimated from Lord Keith that all orders to the crews of the East India Company's ships should be directed to him. He was admitted to the council. The ships were particularly directed to wear pennants, which is in itself, according to the opinion of a distinguished naval officer,<sup>3</sup> an acknowledged mark of an adoption into the military character; and the whole mode of intercourse at the time shows that they were considered in the nature of a combined force.

That non-commissioned ships are capable of being considered in the light of an associated force, is clear [ \* 278 ] from the precedents that have been cited. All the intimidation that can in any case be derived from an associated force, was produced in this instance. It was the cause that induced the enemy to relinquish their hopes of defence; it was materially instrumental to the surrender that took place; and therefore the admiralty is, by virtue of the services of these ships, entitled to share in this prize.

<sup>1</sup> Vide *infra*, p. 284.<sup>2</sup> Vide *infra*, p. 285.<sup>3</sup> Vide *infra*, p. 288.

Against the allegation, the *King's Advocate* and *Arnold*. The capture is admitted to have been made by a conjoint force, under the special instructions of his Majesty; therefore, if a claim was set up to partake in this capture, on the part of private ships of war, actually commissioned against the Dutch, it would be incumbent on them to make out a case of active coöperation and assistance. This, it is apprehended, was fully settled in a case much agitated in another place, the case of the capture of Negapatam, by Sir Edward Hughes,<sup>1</sup> in which a similar question was discussed, whether the ships claiming to share were, under the circumstances of that case, to be considered in a military character or as transports? It was then fully established, that ships in the character of transports cannot share. But it is said that this case stands on different grounds,—on an associated military character, and intimidation produced on the enemy. The association is by no means proved; it rests upon the claimants to make that clear. And, as to intimidation, it was only in the character of transports that the ships in question could possibly produce any intimidation; as ships of war, they were useless. There were, at that time, six or seven men-of-war, as many as could be used, \*lying in Symons Bay, under the com- [\* 279] mand of Lord Keith. In what way could they, then, produce intimidation, as ships armed and appointed as ships of war? The Dutch were lying at some distance, between Symons Bay and Cape Town. General Craig's letter to Lord Keith states "that he was in a critical situation, and disposed to wait six or seven days longer;" not for ships, because Lord Keith was there in force, with a sufficient number of ships of war, but for troops, in ships acting as transports. The intimidation, therefore, is out of the question, as to their military character. But it is said they were treated in that character from the moment of their arrival; that, having hauled down their pennants, they were desired to hoist them again. As far as respect and honorable treatment is concerned, that might be a distinction; but, as a mark of character, that circumstance is wholly immaterial and equivocal, and, to all legal effects, they remain transports still. It is said that they received all orders through their commodore, Captain Rees; but even in this respect the orders are not issued in the same form as to ships of war. For it is stated by Captain Rees "that, exclusive of a number of men sent by the Bombay Castle, he did, in pursuance of an address received from Lord Keith, which he desired to be circulated through the fleet, for the

<sup>1</sup> Lords, 22d March, 1792.

purpose of procuring volunteers, procure twenty men from each ship, amounting to two hundred and forty men," &c. This is not like the order issued to men-of-war. But much reliance is placed on Lord Keith's letter; and it is said that the thanks are addressed not only to the volunteers, but to all the fleet generally. If this letter stood alone, unexplained, and receiving no construction [ \* 280 ] from the facts \* before the court, it might lead to an inference that all the ships were equally entitled; but this is only a general expression of thanks in the hour of triumph, and cannot control the particular evidence in the case, on the points pleaded in the allegation. Lord Keith had no power to give an interest beyond what the facts pleaded can sustain. In cases of non-commissioned vessels, no claim of mere constructive assistance can be admitted; no active coöperation, in any degree bearing upon the capture in question, can result from the facts pleaded in this allegation; and, therefore, it is hoped the court will reject this claim at once, by not admitting the allegation to go to proof.

## JUDGMENT.

SIR W. SCOTT. This question arises on the claim of certain East India ships, or rather of the admiralty on their behalf, to share in the capture made at the Cape of Good Hope. It appears, by reference to the gazettes, and in the allegation, and in all the evidence, as far as it is necessary for me to state it, that these ships were employed to carry a number of troops to the Cape of Good Hope. The greatest part of the naval operations, necessary for the reduction of that colony, had been performed before the arrival of these ships; and there appears to have been only one particular piece of military service performed on the part of the navy after their arrival, and on which only one of these ships was employed. That vessel will, undoubtedly, be allowed to share; as to the rest, although it must be admitted on all sides that the East India Company have performed services, in respect to this expedition, which may entitle them to the thanks of their country, yet the question of [ \* 281 ] \* legal merit, whether they will be entitled to share in the proceeds of this prize, will depend on very different considerations.

It is not stated in what way the agreement was made with these ships, — whether it was to act in a military capacity or not. If it was to act in a military character, that might nearly decide the question; but nothing is said on this subject in the plea, and, therefore, I must infer that no such ground of pretension could be sustained. All that is said is, "that they carried out General Clarke and his



troops." It is perfectly clear that, at the time of leaving the coasts of Brazil, it was perfectly unknown to these ships for what attack these troops were conveying. Whether, by virtue of their contract, they were to stay at any place, or come away after the troops were landed at such place, is wrapped in complete silence; and, therefore, for want of any more particular description, I can look only to their general character, which is that of merchant vessels, commissioned against the French, but having no commission against that enemy who was the particular object of this expedition. Whatever their force may have been, I do not see that they can be considered, in their original character, as more than transport vessels, liable to be called upon, occasionally, to act with alacrity and vigor, (for British vessels of any character are liable to be so called upon on extraordinary occasions of public necessity,) but not deriving from that circumstance, as far as this expedition was concerned, any title to invest them with a military character; for the mere conveyance of troops would have no such effect. At the same time, it is true that a military character might be afterwards impressed [ \* 282 ] upon them, by the nature and course of their subsequent employment. If they have been associated to act, in conjunction with the king's fleet, and did so act, they may acquire an interest, which, on proper application, will be sure to meet with due attention. The question for me to consider, then, will be, whether they have acquired that military character or not? Their pretensions have been put on several grounds. It is first said that they were associated with the fleet. Mere association will not do; the plea must go farther, and show in what capacity they were associated, and that capacity must be directly military. Transports are associated with fleets and armies for various purposes, connected with, or subservient to, the military uses of those fleets and armies. But if they are transports merely, and, as such, are employed simply in the transportation of stores or men, they do not rise above their proper mercantile character in consequence of such an employment. The employment must be that of an immediate application to the purposes of direct military operations, in which they are to take a part.

It is next placed on the ground of intimidation; and it is said, that when the enemy is proved to have been intimidated, where it is not matter of inference but of actual proof, the assistance arising from intimidation is not to be considered as constructive merely, but an actual and effective coöperation. But I take that not to be quite correct; for an hundred instances might be mentioned in which actual intimidation might be produced, without any coöperation

having been given. Suppose the case of a small frigate [ \* 283 ] going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but no one would say that such a terror would entitle them to share. Though the fact of terror was ever so strongly proved, there would not be that coöperation, nor that active assistance which the law requires, to entitle non-commissioned vessels to be considered as joint-captors. What is the intimidation alleged? "That the Dutch forces were about to make an attack on the British army, but, on the appearance of these fourteen ships, desisted." This was an intimidation of which the ships were totally unconscious, and which would have been just as effectually produced by a fleet of mere transports; and I see no principle on which I could pronounce these ships entitled, on which I should not be also obliged to pronounce any fleet of merchantmen entitled in a similar situation; for any number of large ships, known to be British and not known to be merchantmen, would have produced the same effect. The intimidation was entirely passive; there was no *animus* nor design on their part, nor even knowledge of the fact; for it was not till the next day, when their commodore returned from Lord Keith, that they knew any thing of the matter, or ever thought of the terror that they had assisted in exciting. I take it to be incontrovertibly true, that no case can be alleged in which a terror so excited has been held to enure to the benefit of a non-commissioned vessel. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy. That it is a case of assistance, analogous to that of joint-chasing, on which it is said to be sufficient if the non-commissioned ship puts itself in motion; and the cases of *The Twee Gesuster*,<sup>1</sup> in the last war, and

<sup>1</sup> This was a case of a Dutch ship, taken 31st Dec. 1780.

The circumstances of the case were, that on the morning of the 31st, the prize in question, of 300 tons and 16 men, was discovered by two armed cutters, *The Providence* and *Spitfire*, each manned with 16 men, (*The Providence* being commissioned, and *The Spitfire* not commissioned, against the Dutch,) when they immediately chased. *The Providence* first reached the prize; *The Spitfire* being then distant about one English mile, soon afterwards came up, and immediately afterwards the prize was seized by *The Providence* and *The Spitfire*; her prisoners and papers secured, some in *The Providence*, and some in *The Spitfire*; and the master of *The Spitfire* was put on board the prize, with several men, and *The Providence* left the prize with *The Spitfire* to convey her to Dartmouth.

These facts were acknowledged, and *The Spitfire* was allowed to have been a joint-chaser by *The Providence*.

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Le Franc,<sup>1</sup> \* have been relied upon. I see no ground on [ \* 285 ] which the analogy can be supported. The cases \* cited [ \* 286 ]

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The sentence of the Judge of the High Court of Admiralty, 21st June, 1783, pronounced The Providence to be the captor, but that The Spitfire was aiding and abetting; and decreed The Spitfire to take half the share she would have been entitled to, had she had a commission against the Dutch.

This part of the sentence being appealed from, on the part of The Providence, the proctor of the admiralty intervened, 15th Feb. 1785, and prayed, that such part of the prize as The Spitfire would have been entitled to, if commissioned, might be condemned as a droît of Admiralty.

On the 8th of March, 1785, the Lords of Appeal pronounced for the interest of the king, in his office of admiral; and that such proportion of the prize as would have belonged to The Spitfire, if commissioned, was liable to confiscation as a droît and perquisite of admiralty, and condemned the prize "as taken by the private ship of war, The Providence, and the non-commissioned ship, The Spitfire;" and directed the same to be shared in proportion accordingly. Present, Lord Camden; Lord Grantly; Sir Joseph Yorke; Sir Lloyd Kenyon, Master of the Rolls.

A circumstance not unworthy of notice in this case, though not affecting the judgment, was, that it was stated on the part of The Spitfire, "that on the commencement of hostilities against the Dutch, the owners of The Spitfire fitted her out as a private ship of war, sent her on a cruise against his Majesty's enemies, and applied for letters of marque; that the commissioners of the admiralty granted a warrant to the judge of the admiralty to issue letters of marque and general reprisal against the Dutch, to Tessier, the master of The Spitfire, on the 29th of December, 1780; but by reason of the then great flood of business in the Admiralty Court, the letters of marque could not be obtained under seal, till the first day of January, 1781, and that this capture was made on the 31st December."

This was stated among other points, in the *præsertim* of appeal; but the claim of the non-commissioned captor was not allowed. From which it appears, that the endeavors of the party to obtain his commission, aided even by the warrant of the Lords of the Admiralty for its passing, will not be sufficient to vest any interest on intermediate captures, till the commission is actually issued.

<sup>1</sup> The Le Franc, Caspé, master.

This was a French East India ship taken by several vessels composing part of a British East India fleet, 24th June, 1793.

Of the ships in question, The Glatton, Captain Drummond, had not taken out a letter of marque; the others were commissioned as private ships of war.

On the part of The Glatton an appearance was given, praying a decision on the interests on the question of law. The facts being admitted on all sides, "that she was not a commissioned ship, and that she was materially instrumental to the capture," the proctor of the admiralty appeared for the king in his office of admiralty, praying that such proportion of the prize in question as would have been condemned to The Glatton, if she had been a commissioned ship, might be pronounced liable to confiscation to the king in his office of admiralty, as a droît and perquisite of admiralty.

The sentence of the High Court of Admiralty condemned the prize, as taken by six private ships of war, and The Glatton, but condemned The Glatton's share as a droît and perquisite of admiralty.

The facts, as to the situation and merits of The Glatton, are thus represented in the

were of a very different nature; in both of them the non-  
 [\* 287 ] commissioned ships chased *animus capiendi*, \* and contributed materially, in the case of the *Le Franc*, directly and immediately, to the act of capture. In the present case these ships approached, it is true, the coast of the Cape of Good Hope, but with no *animus capiendi*, with no hostile purpose entertained by themselves; for they were totally ignorant of the objects of the expedition. It is, moreover, obvious to remark, that all cases of joint-chasing at sea differ so materially from the cases of conjunct operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint-chasing at sea there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained, and much intimidation may be produced; but, in cases of conjunct operations at land, it is not the mere intrusion even of a commissioned ship that would entitle parties to share. The words of the act of parliament direct, — “ That in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers and commanders, and other officers, seamen, marines, and sol-

words of the certificate of the commanders of the six private ships of war, presented to the lords of the admiralty, annexed to the memorial on the part of *The Glatton*, praying to be rewarded.

“ We, the subscribed commanders of the six duly commissioned private ships of war, which, with the non-commissioned ship *Glatton*, Charles Drummond, commander, captured the French prize *Le Franc*, do hereby certify, that at day-light on the 24th of June, 1793, *The Glatton* was from ten to fifteen miles to windward of our ships, and at the same time the prize was upon *The Glatton*’s weather quarter, distant about three miles, steering to the northward; Captain Drummond thereupon (supposing her to be an enemy) kept the wind until he found *The Glatton* could weather her, and then wore, and chased the prize until she was brought to by *The Ceres* and some of the other ships. And we do further certify, that had *The Glatton* not been to windward, it would have been impossible for the other ships to have come up with the prize, as when she had discovered the ships to leeward, she might have kept to windward and got off, had she not been prevented by *The Glatton*. Witness our hands, the 25th day of March, 1795.”

In the same case a claim was given for *The Barwel*, and several other ships, of this fleet, stating, “ that they sailed as an associated and confederated fleet, for mutual defence, by particular direction of the East India Company; that they were all together on the evening of the 23d June, 1793; that during the night some of the ships had separated; that on the morning of the 24th about six o’clock, *The Barwel* perceived one of the said ships to the eastward; that the commodore made signal to *The Barwel* to chase; that after chasing three hours, she came completely in sight of the said ships that had separated, and when she came up with them, &c., she found they had taken the prize in station.”

The claim on the part of these ships was rejected.

diers, shall have such proportionable interest and property as his Majesty, under his sign manual, shall think fit to order and direct." The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine that private ships of war, by watching an opportunity and intruding themselves into an expedition, which the public authority had in no degree committed to them, should be at liberty to say "We will coöperate;" and that "they should be permitted to [ \* 288 ] derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally intrusted. Expeditions of this kind, designed by the immediate authority of the state, belong exclusively to its own instruments, whom it has selected for the purpose; and it might be attended with very grave obstruction to the public service of the country if private individuals could intrude themselves into such undertakings, uninvited, and under color of their letter of marque. I think, therefore, that the cases of chasing at sea and of conjunct operations at land stand on different principles, and that there is little analogy which can make them clearly applicable to each other. It is next said that they were directed to hoist pennants; and that it was the opinion of a very high military<sup>1</sup> officer in a former case, that the permission to wear the pennant did give the character of a king's ship. But the decision, in the very case in which that opinion was offered, (in the capture of Negapatam,) held that a ship, which in that case had worn a pennant, was not to be considered in a military character, but as a transport. The mere circumstance, therefore, that these ships, which were large ships, and had before carried pennants, and had taken them down only out of respect to the king's ships, and "were desired to hoist them again, I cannot hold to be a [ \* 289 ] sufficient proof that they were, by that act, taken and adopted into the military character. I can attribute no such effect to a mere act of civility and condescension.

In the next place, it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only, (by which I must observe the other party is deprived of the opportunity of counterpleading,) that

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<sup>1</sup> The advocate of the admiralty had said, during the cause, that in the case of Negapatam, he had waited on Lord Hood, and had received his lordship's authority to state it, as his opinion, "That the permission of the admiral of the fleet to merchant vessels to wear pennants, was considered as an act, adopting them into the king's service, for that occasion."

their boats were employed in carrying provisions and military stores on shore; that was a service certainly, but not a service beyond the common extent of transport duty. They landed them, probably at the same time with the troops for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried.

It is likewise said, that they received military orders; and if that fact was sufficiently proved, it might be material; but it is observable, that not a single order is pleaded in the allegation, except in respect to The Bombay Castle. That vessel, it appears, was sent under military orders to create a diversion; and I think I do not give too much to that ship, when I say, that this circumstance was sufficient to clothe her with a military character, being engaged in a military employment and exposed to danger. But it is argued, that because orders were given to man this ship by detachments from the rest, that it will make the whole fleet entitled to be considered as acting likewise in a military capacity. Taking it upon the

[ \* 290 ] argument, that this was done by orders directly \* from Lord Keith, I cannot think, it would have that effect; for in the first place, can it be denied, that a commander-in-chief might exercise a power of impressing a number of their crews, without giving to those ships any thing of a military character? It is within the power of commanders on maritime expeditions, to press persons of that description to assist in any particular service, in such a case of public emergency. But no such orders are pleaded, nor by any means proved to have been given. The communication was carried on between Lord Keith and one particular person, Captain Rees, in the same manner as it would have been done, if they had been mere transport vessels; and the only order mentioned was, that the crew of The Bombay Castle should be increased.

The next military orders that are relied on, are those for a draft of twenty men from each ship, for the purpose of drawing the artillery, &c., and I think the same observation would apply to these also; for I have no hesitation in saying, that, in a remote expedition like this, the commanders of his Majesty's forces have a right to call into their service, for such purpose, the assistance of British mariners; and I hope, and trust, the time will never come, when British mariners will think they are called beyond the line of their duty, when they receive an order to that effect. The fact is, that it was done rather by invitation, as a better mode of doing it, and the words of Captain Rees's deposition describe it, as an address for volunteers, rather than as an exercise of authority and command. These are the whole

[ \* 291 ] military services, with the exception of those indefinite \* ser-

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The *Frau Maria*. 2 C. Rob.

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vices, on which much argument has been bestowed; I mean those referred to in Lord Keith's letter, in which Lord Keith acknowledges that these transports had contributed to the surrender. In the first place, a letter of that kind, written in the moment of victory, should not be too strictly interpreted as conveying any opinion of the writer, on the minute parts of the transaction. Taking it however, to be as argued, that it does show his sentiments at that moment on the matter, it is by no means conclusive upon the question. It might be erroneous in fact; much less can it be considered as conclusive in point of law. Lord Keith is not the only party. On the facts, it is not conclusive against others, and on the law, it is not conclusive against himself; for if he should be found to be mistaken, as to the legal effect of such services, who would say that he would be concluded by this admission. However, looking at the letter carefully, I do not see that Lord Keith might not have written just in the same manner to a fleet of transports, doing their duty with alacrity and zeal, as a general expression of thanks for the performance of those services, in which they had been respectively employed.

Upon the whole of these facts, I feel myself obliged to pronounce, that it has not been shown that these ships set out in an original military character, or that any military character has been subsequently impressed upon them by the nature and course of their employment; and therefore, however meritorious their services may have been, and however entitled they may be to the gratitude of their country, it will not entitle them to share in this valuable capture.

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• THE *FRAU MARIA*, Jansen, master.

[ • 292 ]

December 16, 1799.

Commission of appraisement and sale is an instrument, in the first instance, taken out by captors. They primarily answerable for the expense, &c.

THIS was a case of a motion for a new commission of appraisement on the part of the claimant, on suggestion that the former commission had not been executed by the marshal, as he had refused to return the commission, till his expenses were paid. It was said, that the commission of appraisement was an instrument taken out by the captors, and therefore that the expenses ought to be paid, in the first instance, by them; that the cause of this delay had been unknown to

the claimants; that they would have been ready at all times to advance the expenses, to have prevented the delay by which the cargo had sustained a deterioration of forty per cent.

The *King's Advocate* resisted the motion, saying, that the delay complained of, could not have happened but by the laches of the claimants, who were the persons to look to the due execution of the commission.

COURT. It must be allowed, I think, that the parties in this case are, *in pari delicto*; but I am desirous of laying down some rule to prevent the same inconvenience from happening in future. I am of opinion, that the captor is the person who is to make the payment in the first instance. He is the person who puts the commission [ \* 293 ] into the hands of the officer, \* and desires him to execute it. By whom are the other fees of office paid?

*Registrar.* By the captor.

COURT. Then what ground is there to pretend there should be any distinction? That the claimant may be ultimately interested, is a matter of future consideration. It may be proper that the captor should be indemnified; but I am of opinion that the captor is answerable in the first instance, and I cannot conceive that the marshal is bound to look elsewhere. Where it is done for the accommodation of the claimant, that will be a matter to be settled between them. But I shall certainly hold, that the captor is liable for the expenses in the first instance, though they may be, ultimately, to be divided between both parties. I shall direct a new appraisement in this case; and as the commission is prayed by the claimant in this instance, it must be at his expense, but in future cases it must be as I have intimated.

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\* THE SPECULATION, Feroc, master.

December 16, 1799.

Coasting trade of France expressly forbidden to neutrals by French ordinance.

Misconduct of captors, as to taking depositions. Restitution. Captors expenses forfeited.

THIS was a case of a Danish vessel, taken on a voyage from Dunkirk to Bordeaux, 13th June, 1799; and claimed, together with the



cargo, for — Lund, described in some of the papers as master of the vessel.

For the captors, the *King's Advocate* stated, That the ship appeared to have been carrying on the coasting \*trade [ \* 294 ] of France; a trade, not only generally forbidden, but expressly prohibited to neutral ships by the ordinances of France, which have issued during this war, that she would, therefore, come under the character of an adopted French ship; and in regard to the cargo, that there was such a variation respecting it, that it must of course go to farther proof; the bill of lading being avowedly colorable, describing Lund as shipper, whilst he himself on his examination describes the cargo to have been shipped by a French merchant; and, as one of the mariners deposes, "Mr. —, of Dunkirk, was lader and owner."

For the claimant, *Laurence* contended, That the evidence of the mariner, who gave this account of this property, was not entitled to the attention of the court; that he was not examined till three weeks after the other depositions had been brought in; that he had, in the meantime, been a week on board the privateer, and at last only ventured to speak to his belief, without assigning any reason for it.

[Court. I perceive these examinations are taken at Jersey; the commissioners must understand that this is not the proper mode of proceeding. After the depositions have been taken and transmitted, the commissioners are not to go on examining afterwards; neither is it proper that the captors should take out the whole of the crew, and then come in afterwards \*with a subsequent [ \* 295 ] examination.<sup>1</sup> I shall pay no attention to this man's evidence.]

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<sup>1</sup> The twenty-third section of the prize act provides for the speedy expediting of the process of prize causes, in these terms: And for the more speedy proceeding to condemnation, or other determination of any prize ship, &c. "That the Judge of the High Court of Admiralty, and of any other Court of Admiralty which shall be authorized thereto; or such person or persons who shall be by them commissioned for that purpose, within five days after request made to him or them for that purpose, shall finish the usual preparatory examinations of the persons commonly examined in such cases, &c."

And the second and third articles of Instructions to Cruisers direct, that the commanders of ships and vessels, so authorized as aforesaid, shall bring all ships, vessels, and goods which they shall seize and take, into such port of this our realm of England, or some other port of our dominions as shall be most convenient for them, in order to have the same legally adjudged.

*Counsel.* With respect to the ship it has not been held, in the present war, that the mere circumstance of being engaged in the coasting trade of the enemy does amount to that adoption [ \* 296 ] which will subject the \*property to condemnation. Of the later regulations of the present government of France, it is not known how far they have been carried into execution; which is a material fact, of which the court will always expect to be informed, before it proceeds to draw any conclusion from them. They could not at any rate be known to the captors in this case; and, therefore, they are no justification to exonerate them from making the claimant compensation for this seizure.

## JUDGMENT.

SIR W. SCOTT. This is the case of a ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture, because the very circumstance of being engaged in conducting the trade of the enemy from one port to another, will justly subject the vessel to inquiry; and perhaps in some future case the court may have occasion to consider how far the regulations, that have been alluded to, and the acting upon them, (which it may be proper to consider at the same time,) may not make such a trade liable to be considered as a case of adoption. As to the present case, I am compelled to observe, that, although captors may have made a justifiable seizure, yet they may still forfeit that title by subsequent misconduct; and I think there is misconduct in this case, which may be traced up to them.<sup>1</sup>

The third deposition is stated to have been taken at the instance of the captors; and it now appears that they took out all but two persons from the captured ship.<sup>2</sup> I cannot help thinking, [ \* 297 ] that to leave only two \*persons, has the appearance of

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Third article, That after such ships, vessels, and goods shall be taken and brought into any port, the taker or one of his chief officers, or some other person present at the capture, shall be obliged to bring or send as soon as possibly may be, three or four of the principal of the company\* (whereof the master, mate, or boatswain, to be always two) of every ship or vessel so brought into port, before the judge of the High Court of Admiralty, &c., or his surrogate, or such persons as shall be lawfully commissioned in that behalf, to be sworn and examined upon such interrogatories as shall tend to the discovery of the truth, &c.

For the whole of the Instructions, see Appendix.

<sup>1</sup> [The Betsy, 1 C. Rob. 95; The John, 2 Dod. 836; The Anne, 3 Wheat. 435.]

<sup>2</sup> [The Bothnea, 2 Gall. 88.]

\* [See The Bothnea, 2 Gall. 88.]

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The Calypso. 2 C. Rob.

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something very like a management and a tampering with the evidence. From the return of the commission it does not appear that there might not have been more than two on board; therefore it remains wholly unexplained, how this evidence has been taken and introduced out of due time. I desire it may be intimated to the commissioners, that they have not acted regularly, and that in future they are not to show so much facility to captors, if such a thing should ever be required of them again. After this view of the case, I am not disposed to aid the captors more than I am compelled to do; as far as the court has any discretion they shall have no favor; the attempt to introduce evidence irregularly taken, and liable to the suspicion of being unduly obtained, will always work that consequence at least. As to the property of the ship, no doubt is raised; and the cargo does not appear liable to any solid objection. I am not disposed, therefore, to order farther proof; and I am farther of opinion that the captors are not entitled to that protection which the court would otherwise have given them on a seizure of this nature, by directing the claimant to pay their costs.

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• THE CALYPSO, Schultz, master.

[ • 298 ]

December 19, 1799.

Notification of blockade of Holland; time for constructive notice at Rotterdam, 15th April, 1799; actually known at Amsterdam, 13th April.<sup>1</sup>

[Egress with a cargo partly laden after notice of blockade, a breach of blockade.]<sup>2</sup>

THIS was a case, arising on the blockade of the United Provinces, respecting the time allowed for the communication of intelligence, and the consequence of taking in a cargo, after due notice of the blockade. It appeared that the ship sailed from Rotterdam on the 4th of May; that the cargo had been begun to be laden on the 4th of April, and that remaining parts were taken in so late as the 20th.

JUDGMENT.

SIR W. SCOTT. I think I am under the necessity of saying, that

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<sup>1</sup> [The Jonge Petronella, 1 C. Rob. 131; The Ringende Jacob, 1 C. Rob. 91 and note; The Adelaide, 3 C. Rob. 384; The Nancy, 1 Stewart, 28.]

<sup>2</sup> [See The Vrow Judith, 1 C. Rob. 152, note.]

the notification of the blockade must have been known at Rotterdam on the 15th of April, as it has appeared in evidence in another cause, that it was known to the Prussian consul at Amsterdam on the 12th. I am, therefore, compelled to say, that the continuing to take in a cargo, after the time when the party was bound to take notice of the notification of blockade, will be sufficient to render the ship liable to condemnation. This is the determination which I am bound to make, in conformity to the principles which I have before laid down on the subject of blockade.

The master was, in this case, claimant of the ship; but the court, exercising an indulgence which it is at all times desirous of showing to this class of men, when their conduct is fair and unimpeachable in point of good faith, allowed him his private adventure, and all the personal expenses incurred by his attendance to claim, &c.<sup>1</sup>

[ \* 299 ]      \* THE WAR ONSKAN, Biedumpel, master.

December 19, 1799.

Salvage, not formerly given on recapture of neutral property, given this war, owing to the rapacious proceedings of French cruisers and French Courts of Prize.<sup>2</sup>

THIS was a case of a Swedish ship, taken by the French, on a voyage to Oporto, and retaken by a British cruiser, 26th October, 1799.

In opposition to the demand of salvage, which had been allowed in various instances during the present war, it was said that it had

<sup>1</sup> [Other cases in which this allowance has been made or refused, 2 C. Rob. 111, note; Ib. 128; 4 C. Rob. 120; 6 C. Rob. 382, 429, 462, note; 1 Edw. 264; 2 Hagg. Ad. R. 91; Hay & Marriot, 178, 219.]

<sup>2</sup> [The Carlotta, 5 C. Rob. 54; The Huntress, 6 C. Rob. 104; The Eleonora Catharina, 4 C. Rob. 156; The Acteon, 1 Edw. 254; The Barbara, 3 C. Rob. 171; see note to this volume, post, p. 375. The United States have treaty stipulations respecting salvage on recapture from enemies with the following nations:

Netherlands,	viii. Statutes at Large.....	50, 52
Prussia,	viii. " " .....	94, 172
Sweden,	viii. " " .....	70, 72

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The War Onskan. 2 C. Rob.

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not been the practice of former wars to grant salvage on the recapture of neutral property; that, in the present case, there was the less reason for it, as the vessel was seized only on account of the cargo, which, according to the French laws, would be a cause of inquiry only, and not of condemnation; and that the French prize-master had expressly engaged that the vessel should be restored.

#### JUDGMENT.

SIR W. SCOTT. I do not mean to lay down any general rule on this subject, nor am I so fond of doing that as gentlemen may be ready to propose it. It has certainly been the practice of this court, lately, to grant salvage on recapture of neutral property out of the hands of the French, and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the law of nations<sup>1</sup> to grant salvage on recapture of \*neutral vessels, and upon this plain principle, [ \* 300 ] that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him; inasmuch as that same enemy would be compelled by the tribunals of his own coun-

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<sup>1</sup> In the early periods of English history (and perhaps much later) there are to be found traces of a pretension to appropriate to the captor the ships and goods of neutral merchants that were taken by one belligerent out of the hands of his enemy. *Lit̄ra ad Regem Portugallie, super bonis de guerra lucratis responsiva*, 31 Ed. 3, A. D. 1357, Rym. Fœd. v. 6, p. 14; and again, an. 2 H. 4, Rym. Fœd. v. 8, p. 203. To the master of the Teutonic Order of Prussia.

In the former instance a strong remonstrance had been made on the part of Portugal; and the answer, asserting the property to be legally acquired to the captors, is very full and explicit. In the latter instance, an embargo had been laid on British property, on account of the detention by the captors; and this fact of recapture from the enemy, was deemed a sufficient justification on the part of the English monarch, to found a demand that the embargo should be taken off. In later times a more equitable practice has prevailed; and neutral vessels, taken out of possession of the enemy, have been restored, even without salvage, both in our Prize Courts, and in France, provided the property was affected by no circumstances, that would have incurred condemnation in the court of the enemy.

Such was the limitation expressed in the ordonnances of France, Code des Prises, an. 1784. "Sa Majesté a jugé pendant la dernière guerre, que la reprise du navire neutre faite par un corsaire François (lorsque le navire neutre n'étoit pas chargé de marchandises prohibées, ni dans le cas d'être confisqué par l'ennemi) étoit nulle." See various decisions, Cons. des Prises, 1784, vol. 2, p. 725, 1024, and 1049.

Whether the dangers to which neutral property has been exposed from French courts and French cruisers during this war, have been sufficient to form an exception from the old rule, the reader will, in some degree, be able to judge for himself, by a summary view of their edicts, and the general character of their cruisers, according to the estimation of their own writers, printed in the appendix.

try, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. This proceeds upon the supposition, that those tribunals would duly respect the obligations of the law of nations; a presumption which, in the wars of civilized states, each belligerent is bound to [ \* 301 ] \* entertain in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property, — the one by its decrees, or the other by its decisions, — the liberation of neutral property out of their possession has been deemed, not only in the judgment of our courts, but in that of neutrals themselves, a most substantial benefit conferred upon them, in a delivery from danger against which no clearness and innocence of conduct could afford any protection. And a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared and practised by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shown to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise. But of that fact no evidence whatever is offered, excepting that the French prize-master said, "That the vessel would not be prize, only the cargo." A thousand motives might extract such a declaration as this from him, very little connected with its truth. It might be only to conciliate the master, and purchase from him a corrupt testimony respecting the cargo. When the ship was once within the gripe of a French Admiralty Court, it was much beyond the power (supposing it within the inclination) of that master to say, with certainty, that she would ever find her way out of it.

No proof is offered that the maritime tribunals of France [ \* 302 ] have, in \* any degree, corrected either the spirit or the form of their proceedings, respecting neutral property generally; and, therefore, I shall not think myself authorized to depart from the practice that has been pursued, of awarding a salvage to the captors.

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The Conqueror. 2 C. Rob.

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THE MINERVA, Henricksen, master.

January 15, 1800.

Expenses allowed on corn ships, of which the cargoes had been taken by government; but only where the original evidence of property was complete, &c.

THIS was a question as to the allowance of expenses, in the case of a cargo of corn, taken 23d April, 1794, in a Danish ship, on a voyage from Amsterdam to Leghorn.

It was objected, by the *King's Advocate*, that the circumstances of this case did not come within the rule laid down for the allowance of expenses in the corn ships; that the rule was, to grant the expenses in those causes where the evidence of property was clear, and sufficient to obtain restitution on the original evidence, but not to grant them where there was a defect of evidence, requiring farther proof. In such cases it was held, that, as the seizure was justifiable, the parties were not entitled to their expenses. In the present case, there was in the original evidence no proof of property, either in the papers or in the depositions.<sup>1</sup>

COURT. Then I fear this case does not come within the rule.

Expenses refused.

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\* THE CONQUEROR, Tate, master.<sup>2</sup>

[ \* 303 ]

January 16, 1800.

Case of property. [Condemnation on failure to make out title.]

THIS was a case on farther proof, on the claim of Mr. Peschier, of Copenhagen, for a cargo of brandies, shipped in France, as it was asserted, for his account, and carried to Holland, and from Holland

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<sup>1</sup> One sixth part of this cargo was condemned, as the property of the subjects of Holland.

<sup>2</sup> [Affirmed, on appeal, March 22, 1803.]

sent to London, for the English market ; where they were seized as prize by the marshal of the Court of Admiralty.

#### JUDGMENT.

SIR W. SCOTT. This question arises on a seizure made by the marshal of this court, in December, 1794, of several parcels of brandies, on board this, and two other British ships in the port of London ; and that circumstance would undoubtedly lead the court to pay very great attention to any observations offered on the part of the claimant, because the *prima facie* presumption, arising on goods found in such a situation, is, that they are not the property of an enemy. The marshal would receive no encouragement from the court to make hasty seizures on light grounds of suspicion ; such a practice would manifestly operate to the great discouragement of the trade of this country ; and therefore if it appeared, that a seizure was made on light information, it would be treated with no sort of indulgence, but on the contrary, receive very severe reprehension. On the other side,

if it should turn out that the case was loaded with difficulties, \* which appeared hardly consistent with a fair case ;

and if they remain unexplained, after the parties have had all opportunities given them of producing their explanation, with the advantage of having heard the remarks which the court made on the deficiencies and difficulties of the original case ; the marshal, in having made such a seizure, will have deserved the character of a careful and diligent officer of the court.

In the first proceedings of the cause, a monition issued to bring in the papers, which had been delivered to some merchants of this city ; among the rest, the bill of lading was brought in, but as it did not express the account and risk, the parties had a right to demand to be admitted to farther proof ; and they had a right also, on the grounds above-mentioned, to expect, that their explanations, and farther proof, would be accepted with the most favorable consideration that any case could receive. The farther proof was brought in ; but being of a nature calculated to generate new doubts, rather than to remove those which had been originally suggested, it was pronounced insufficient ; and, still further proof was directed to be made. I am now to decide on this proof, and I am not to take up the cause, on the grounds stated, "respecting the personal character of the parties ;" nor am I to attend to those consequences that have been mentioned, "that if this is not a fair case, Mr. Peschier is perjured ; and Mr. Agier is perjured, &c. &c." The true nature of the proceeding

is, that they exhibit the history of their case, and the proof \* 305 ] they make of it ; and I am to decide upon \* that. If it should



appear to be loaded with insurmountable difficulties, how it may hit the character of this or that individual, is a consideration foreign to the subject; I am to decide upon facts, and not upon reputations.

In the first proof brought in, which very imperfectly opened the origin of the business, it appeared that a ship which had been sent from Copenhagen, had found its way into a French port, being, as it was asserted, captured by a French privateer; and that the goods were immediately taken by the French government, and paid for by the present cargo. If I am right in my recollection, nothing appeared in that proof, either respecting the quality of the cargo or the property, or the destination to America. On all these material points, that proof was totally silent. The property of that outward cargo, was undoubtedly a point very material to be proved; for if this was a cargo, taken in payment for that, the owner of that cargo, must, *primâ facie*, be taken to be the owner of the present cargo; it was therefore necessary to determine that question. It now appears that the outward cargo consisted of saltpetre, hemp, and iron, going to America, and, as it is now stated, not on the account and risk of the present claimant, but on account of other persons resident in America, who would, therefore, be *primâ facie* owners of the present cargo, unless the former interests should appear to be controverted by competent authority, and handed over to the present claimant. The present claimant, before the court, is Mr. Peschier, of Copenhagen; and his attestation states, "that in 1794, he received a letter from Mr. St. John, in America, informing \* him of the [ \* 306 ] high price of these articles in America, and ordering the shipment of a cargo for his account; and that this letter was destroyed by the great fire which happened at Copenhagen in 1795." This is the reason given for the non-production of that letter, a most material letter, for it lays the foundation of the whole case; I mean of the truth of the destination of the former cargo to America, whither it is asserted to have been going; and in a peculiar manner, on the account of Mr. St. John, of New York, consigned to other merchants of the same town, where Mr. St. John himself was established as a merchant, and was capable of receiving it himself. This circumstance has furnished an observation on the part of the claimant, that such a complexity, and multiplication of hands, through which the transaction was to pass, gives it the appearance of a fair case; for, that if it were fraudulent, it would have been confined to as few actors as possible. At the same time, there is this difficulty on the other side; that, if it is a fair case, it is not easy to conceive why Mr. St. John should go so far out of the ordinary mode of trade, as

to direct a consignment, on his account, to another person in the same town, where he was acting as a merchant. It is not too much to say, that there is a balance of difficulties on both sides, on the ground of supposition; and, therefore, leaving them both out of the question, I can only observe again, that it is to be lamented, that this letter, which was the origin of the transaction, is not exhibited. The reason given, is, that it was destroyed by the fire at Copenhagen; at the same time it cannot be but that an original copy of that [ \* 307 ] letter (if I may so call \* it), must be remaining in the copy book of Mr. St. John, in America; and indeed, it could hardly have been necessary to wait for a return from America, to supply the proof desired; for this, I think, must have happened, that much subsequent correspondence must have taken place. Mr. Peschier must have written to inform Mr. St. John of the sailing of this cargo; and there must have been other letters from St. John, or other merchants, on his account, written to Mr. Peschier, in allusion to these original orders; and they might have been produced. These would have been very satisfactory to the court, and would in a great measure have supplied the defect of the original order. But the fact is, that no such letters are produced; and it is an observation that very much affects my mind, that no one letter from any merchants in America, or to them from Mr. Peschier, is brought forward.

It is said that there could be no reason why Mr. Peschier should use the name of an American merchant, as he would have a perfect right to send such a cargo, as a neutral merchant, to America, in his own name; and it is true. But I think I can see a reason why, if it was intended to find its way by any pretended accident to France, it should go under an American character; because, if it was the property of a Danish subject, it was particularly forbidden by the Danish treaty to carry such articles to an enemy's ports. However, Mr. Peschier's attestation states "that in March or April, 1794, in pursuance of these orders, he freighted the ship *Christianshaven*, of Mr.

*Agier*, and shipped a cargo of hemp, iron, and saltpetre, con- [ \* 308 ] signed to Murray and Barret, of \* New York, for the account and risk of Mr. St. John, and sent a letter of advice to the consignees." Now, this letter, if I am right, is the same letter as was sent on board the vessel; because, it does not appear from any part of the account, that there was any other letter to Mr. St. John, than that to the consignees; and this is, in my opinion, a particular circumstance in the case, that having received an order for a valuable cargo, Mr. Peschier should take no other notice of it than by writing to the consignees on board the ship in which the cargo was going. The letter is to this effect: "By order, and for account and risk of our

common friend, Mr. W. A. St. John, of New York, I have the honor of sending you, by F. Corran, the bill of lading, &c., and beg you will procure a good reception for this loading, and act according to the direction of Mr. St. John respecting it." This is all the information, as far as I can find, that Mr. Peschier sent to Mr. St. John, in respect to this cargo; a mere letter to the consignees, who were, as far as it appears, not privy to the orders. I cannot help thinking that this is a very naked circumstance, and not a very probable beginning to such a transaction. The attestation then goes on to state, "that no insurance was made, as he had received no order to that effect, and therefore no document of that kind can be exhibited." Now that such a cargo as this should be going across the Atlantic, and no insurance be made, is not very probable. That it should be insured in America, could scarcely be, as Mr. Peschier had not sent any information respecting it; but if it was going for the French government, it is very intelligible, that they might stand their own insurers, and \*therefore that Mr. Peschier might [ \*309 ] receive no instruction about it. The attestation says, "that Mr. Peschier wrote no other letters than this to Mr. Murray;" none to Mr. St. John, who had sent him a very urgent one, stating the price of these articles, and the good speculation that they afforded in the American market. In return for this letter, and these orders, he does not write one syllable to say even that the orders had been executed, or were in a way of being executed, though Mr. St. John had attached so much importance to them. This, as far as I am able to judge, would be a very unnatural manner of transacting such a business. Mr. Peschier says, "he wrote no other letter to America, because he heard the master had written, whom he had intrusted to write in case of need; and that the said master was an honest man, particularly recommended to him." It is to be observed that he is taken up in this business, very little above the capacity of a common carrier-master. The vessel is not Mr. Peschier's. He charts it as he would have done any other vessel. The master was not the consignee, but was to deliver the cargo to Murray. Then, I cannot see what trust was naturally, in the course of trade reposed in him, more than in any other ordinary master. Mr. Peschier says, "that he had intrusted him to correspond with them in case of need." In case of capture, it certainly was proper that he should write to the owners of the cargo; it is the duty of a master so to do; but I cannot understand that he has authority to dispose of the cargo, or to enter into new speculations for the owner. It is scarcely possible, I think, for a man to \*have deviated more from his instructions than [ \*310 ] this man does; for how does he act? In case of accident he

was to have written to America, with the hope of receiving instructions from thence. Instead of that, he enters into an agreement about the cargo, and writes to Mr. Peschier on the subject, although it was a speculation in which Mr. Peschier was no farther concerned.

Mr. Peschier proceeds to state, "that the ship, in the prosecution of her voyage, was forced down to Dunkirk, and taken and carried in by a French privateer; and that he did not give the master directions in writing, because he was particularly recommended to him as an honest and faithful person." If any power was given to him over the cargo, it should have been prescribed in written instructions; and true it is, that the master in his protest, says, "that he had been proceeding in his voyage according to written instructions given to him by the freighters."<sup>1</sup> To account for this sort of contradiction it is said that Mr. Agier, his owner, and not the freighter, had given written instructions, and that he must have alluded to them. But I can hardly believe that (at the moment of the production of these instructions,) he should describe them as given by his [ \* 311 ] freighter, and not by his owners. \* Mr. Peschier's affidavit states farther, "that on the ship being taken and carried into Dunkirk, the cargo was seized by the French government, and payment was made by the brandies which were to be taken in at Brest. That immediately on hearing of the capture, he charged himself with the whole care of this expedition, to save his friend, who was at a distance, a number of troubles and inconveniences, and because he could prosecute the business with more strength and energy; and more especially because he had not, at the time of capture, had a convenient opportunity of drawing to the amount of the cargo on St. John, and feared that his bills would be protested if the news of the capture should arrive before his bills were accepted." But what reason could there be for entertaining any such apprehension, if he had the letter of orders by him? At that time it could not have been destroyed. What would have been the natural conduct? undoubtedly that he should have written to Mr. St. John, informing him of the capture and failure of that expedition, and stating his hope to be able to execute the commission with more success at another opportunity. But no such letter appears to have been written. Instead of that conduct which it was almost unavoydably

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<sup>1</sup> "It was stated in the extract from the register of reports of Danish captains, made to the Danish consul at Dunkirk, May 4, 1794, that Corran had declared, &c., to have departed from Copenhagen, &c., with a loading of saltpetre, hemp and iron, destined for New York, intending to conform himself to the instructions of his freighter, this day produced at the office of this consulate."

necessary for him to pursue, Mr. Peschier immediately charges himself privately with the whole concern.

The account proceeds to state, "that in September, 1794, Mr. Peschier received the account of the shipment of the brandies from the master, and also the invoice and bill of lading of the French shippers, and that he waited in expectation of the arrival of the said cargo at Altona. That according to his usual [\* 312] custom he had made no insurance; and that he since has been informed, and believes, that the ship was driven by bad weather into the port of Rotterdam." That is rather a singular expression. The account given by the master is, "that being in want of a cable, and the ship leaking, he was induced to put into Rotterdam." To be driven into the port of Rotterdam, considering the situation of that port, is not very intelligible; an inland port, very much up into the country. The master waits for no directions, but forthwith unlivers the cargo, and puts it into the hands of merchants at Rotterdam, where it was prepared for the English market; afterwards put on board other vessels and sent to London. This is the account of the transaction, given on the part of Mr. Peschier, to supply the defect of the former evidence in respect to the quality of the articles, and the destination to France, which are material points, and which, I cannot help thinking, were at first, with a most sedulous caution, kept out of the sight of the court. There was a delicacy and a reserve about mentioning the nature of the cargo, that very much inflamed the curiosity of the court. It is at last extracted with some difficulty, that that cargo was saltpetre, hemp, and iron. It finds its way into France by one accident; and the returned cargo finds its way into Holland by another. It is the misfortune of this ship never to reach the haven where she would be.

I am now called upon to consider the correspondence between the master and Mr. Peschier; for as to the persons in America, it does not appear that they received the least information [\* 313] from any one person. Mr. Peschier says that the master had authority to write to them; but he does not appear to have written, nor does he even describe his cargo as going to America.

Then let us look at what must be the test of every transaction; at what would have been the natural conduct of any person employed as the master of a vessel, with the care of a valuable cargo. It would undoubtedly have occurred to any person that it was his duty to write to the persons in America, and also to the shipper in Europe. What would be the duty of the merchant shipper? Undoubtedly to write to the merchant in America; because, although the expedition had failed, it was still his duty to give him an account of it, and state the

measures that he had taken to bear him harmless. Is it possible, that as a diligent merchant and a faithful agent, he should not be desirous of informing his employer of the friendly interposition that he had used to protect his interest, on failure of the original expedition? Instead of that, the merchant in America is left to the meagre correspondence of the master, who had no authority to say that this cargo was taken back by Mr. Peschier. All that Mr. Peschier does, is to leave his friend in America to the correspondence of this master.

The first letter that I shall observe upon, is a letter from the master at Dunkirk to Mr. Peschier, of 15th May, 1794, informing him of the accident that the ship had met with; that his ship was in the hands of the national guards. "We have demanded permission [ \* 314 ] to proceed on our voyage, which has been \* refused by the commander-in-chief of the marine. He says, I must apply to the commission of commerce for redress; and has ordered my whole cargo into requisition. I consequently mean to leave this place for Paris as soon as possible, in order to make every necessary application; and if an opportunity offers, will advise you of the event. I mean to employ Mr. J. Swan, who is now in Paris, and with whom I have been long acquainted in America; besides, I am informed he has great influence."

The style of this letter is not very natural, for a man under such circumstances. That he should apply for redress is extremely natural; but it is not equally natural, that he should desire to have some instruction from Mr. Peschier, in one case or the other? If the cargo should be returned, was it not natural that he should say, I shall pursue my voyage to America; or if a requisition was to be put on his cargo, or a prehension, (as they sometimes phrase it), and compensation was to be made in money or in goods, was it not natural that he should ask what he was to do with one or the other? Instead of that, measures are immediately taken to go to Paris, and employ Swan, without asking any advice, either as to the success or miscarriage of his application.

The next letter is of the 20th of June. "I have just returned from Paris, and after many applications, I have obtained promise of payment in Cognac brandies, for my whole cargo put in requisition. I have proposed to accept half in specie and half in Bordeaux wine; but specie I could not get on any terms. I mean to proceed in the ship or send her round to Charante, and as soon as I can [ \* 315 ] get a \* statement of the business from the commissioner of commerce, will give you a copy of the same. I have empowered Messrs. Hennessey and Turner of Cognac, with whom I have been long acquainted, to receive part of the brandies, and have them prepared for shipping."

It is true that the master was to act for the best, and so far he may appear to have done ; but the objection is, that having the opportunity of consulting the opinion of his employer, he never refers to his advice. When a man is placed under necessity, he must act under necessity ; but when the necessity is removed, he still acts with the same ungoverned and uncontrolled authority, never once asking Mr. Peschier what he was to do for this American friend, nor once mentioning his name.

The next letter is of 24th August, from Charante. "I flattered myself, ere this time, to have had the pleasure of hearing from you in answer to mine of 15th May and 20th June, from Dunkirk, and of 26th ultimo from this place." And well might he be surprised ; for that Mr. Peschier should have sent a valuable cargo, and have been in danger of losing it ; and that he should not have written, but have rested on his oars for six months together ; and more especially considering France to be as destitute of law as it has been for some time past ; and that the master had never said what he meant to do with the brandies, is a course of conduct so irreconcilable to any notion that I can entertain of common mercantile prudence, that I consider it as utterly inconsistent with the feeling of a real proprietor on such an occasion. The master goes on :—"I assure you the  
\* said gentlemen have exerted themselves, not only in pro- [ \* 316 ] curing for me brandies of the best quality, but in getting coopers, &c., which are very difficult to be had here for private business, as almost all workmen and small vessels are employed on national account ; and as soon as I settle my account here, and get a certificate from the agent national of this place, saying the quantity of brandy I have received, and a note of the quantity that remains on your account, I will proceed from hence to Altona, where no doubt you will be better pleased to have the brandies at that market than at Copenhagen at this season of the year."

Now, that the master should take it into his head to do this ; that he should divest the American merchant of his interest, and take on himself to suppose, that the property was to revert back to the account of Mr. Peschier, and talk of it as for the account of Mr. Peschier ; that he should go before the consul of his own country and make oath, that it was for the account of Mr. Peschier, when he must have had every reason to suppose it belonged to the merchant in America, is utterly inconsistent with any fair probability of the good faith of the parties concerned.

The master goes on :—"Should I meet with contrary winds I may perhaps go to Guernsey or Jersey ; and although I have not

your orders, if I am permitted, will endeavor to dispose of part of my cargo there on your account."

I have to observe, that this was not the business of a day; months and months elapse, with abundant opportunity of intelligence; and, as to what is thrown out, that jealousies might exist; what [ \* 317 ] jealousy could \* exist about the exporting a cargo of brandy to Altona, more than to any other port? It is impossible that any such reason could have operated to obstruct the correspondence, in the manner in which it appears to have stagnated between these parties. I now come to the correspondence on the part of Mr. Peschier. The last letter of the master was dated the 24th of August. The first letter that Mr. Peschier writes in answer to those which he had received, bears date of the 21st September, 1794. "I have received three of your favors, of 15th May, 20th June, and 22d ultimo, from Charante; and note the contents; the latter covering a copy of the accounts you got settled with the commission of commerce at Paris; which settlement I think you were fortunate in obtaining. Your other favor of the 26th July, I have not received. I hope this will find you safe arrived at Altona with the whole of your cargo, and that you have not put into Guernsey as you intended. I request you will have the cargo landed and nicely prepared, and ship them on board an English vessel for London; accompany them there yourself, and have them sold, and remit the proceeds to Messrs. Lubbert and Dumas in Hamburg, for my account."

I cannot help thinking that Mr. Peschier has left his account of the correspondence with the master in a very imperfect state. This man is not his agent, but the master of another person's vessel. The first expedition was at an end; on what foundation could Mr. Peschier direct him to accompany the brandies to London?

[ \* 318 ] If he had been his private agent, such an \* instruction would have been very natural; but considering the master in the light in which he is held forward, as the master of another person's vessel, how is it to be understood that Mr. Peschier should direct him to go in another vessel, and accompany his goods to London? He goes on:—"I will settle with your owner; and, when I have the pleasure of seeing you, I will thankfully satisfy you for your strict attention to my interest. You will see that the amount is insured in London, or order, if so to be done, and that the brandies are not stronger than the London standard. I am so well satisfied with every part of your conduct in this troublesome business, that I cannot do better than leave the whole to your management. You will, therefore, act as you find most advantageous to my interest."



An observation on this part is, that there is no mention of any agent in London; but in another letter, written to the master at Rotterdam, on the 7th of October, it appears that Mr. Peschier did direct him to apply to Messrs. Wolff & Dorville. "You will follow my advice of the 21st ultimo, the same as if you were at Altona; and have only to observe, unless you have already made choice of a house, that you will apply to my friends, Wolff & Dorville, who have my whole confidence, and will cheerfully serve you." So that, though the master was to come to London, where he would be in need of the assistance of a house, it is not till this late period that it occurs to Mr. Peschier.

This letter was written to the master at Rotterdam, into which port, it appears, he had been driven, and where, it [ \*319 ] appears, he had himself come to the resolution of sending the brandies to London, without the direction of Mr. Peschier; and it is on the 26th of September that he writes to Mr. Peschier, informing him of the accidents that had carried him thither, in these terms:—"No doubt, ere this, you expected me at Altona; but a multiplicity of disappointments and delays had kept me so long at Charante, and I am sorry to inform you we are driven into this place very leaky, with loss of sails, a cable, and anchor, and must have my cargo all taken out before I can repair. I am afraid the season will be far advanced before the necessary repairs can be done; consequently I have engaged a warehouse for the brandy, and, was it not for the situation of affairs at present in this country, a good price might be obtained for part. Under these circumstances, I am of opinion it would be a good plan to send some to the English market, as, by the last accounts, the prices of good brandy are very high. Should I resolve on this, I find it will be necessary to have them prepared exactly at the strength admitted into that country; nor will small casks, I am informed, be allowed to be imported. I have taken the assistance of my friends, Rocquette, Elziviere & Co., of this place, who have engaged to do the business for one half per cent., exclusive of duties, cooperage, &c., and to use their best to give me dispatch."

Is this such a letter as a man would write to the owner of his cargo?—no time, no day mentioned, when the accident happened. Certain it is that he had been in Rotterdam some days; he had been landing his cargo, and speculating on the state of commerce \* there; he says,— "A good price may be had for a part of [ \*320 ] it here." Is it not natural that a trusty person, meeting with this accident, should write immediately; and state the time when the accident happened? Instead of that, he writes:—"I find

a good price may be obtained in the London market; should I resolve on that, it will be necessary to have them repaired here." Was Holland in such a state that the master could receive no instructions from Mr. Peschier? Is this the style of a man soliciting instruction? On the contrary, it is the style of a man acting with uncontrolled authority, as if the property belonged to himself. "Should I resolve on this," &c., "I have applied to my friends, R. and —, who have undertaken it," &c. Is a carrier-master to make this election, without reference to his employer? Or is Mr. Peschier, who is a man of large and spreading concerns over Europe, without any correspondent at Rotterdam? Or is it for the master to take upon himself to make choice of agents, without a reference to his employer in respect to the care and judgment of the person employed? On the 14th of October the master writes again to Mr. Peschier, and says: — "Your esteemed favor, of the 21st ult., for the first time came this day to hand. I am happy that my conduct has procured your approbation." I may be wrong, but I protest it appears to me that his conduct had been directly such as could not meet with approbation. In the same letter the master says,—"That Rocquette & Co. had recommended him to Vandyke & Co.;" and, in answer, Mr. Peschier says, in his letter of 21st December, [ \* 321 ] — "That he hears his brandies, \* in the hands of Vandyke, are seized in England;" and directs the master to go to London immediately, to endeavor to obtain restitution, but recommends Wolff & Dorville; but still the appointment of the master prevails. The master had written on 22d October:—"I also observe you wish Messrs. Wolff & Dorville to have the business, to which I would gladly comply had we not already given the whole management to Mr. Vandyke and Mr. Broomfield, who have orders to remit two-thirds of the value, or honor draft to that amount on your account." And notwithstanding the direction of Mr. Peschier, in his letter of 21st December, the business remains in the hands in which the master had chosen to place it. Is not this a feature of a most extraordinary nature, that a merchant should acquiesce in the adoption of an agent utterly unknown to him, and obtruded on him by the officiousness of this volunteer agent in Holland?

Looking at the whole of this case, I find so many improbabilities attending it in every part, that I cannot compel my mind to a belief the property is as claimed; and advertent carefully to the nature of the seizure, (which, I have said, ought to entitle the parties to every favorable consideration,) I must still think that the proof does in no degree correspond with the claim. The consequence will be, that this cargo must be pronounced subject to condemnation.

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The Harmony. 2 C. Rob.

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\* THE HARMONY, Bool, master.<sup>1</sup>

[ \* 322 ]

January 16, 1800.

Case of domicil, respecting the national character of a partner in an American house, residing for a considerable time in the enemy's countries. His property considered as the property of an enemy. Condemned.<sup>2</sup>

THIS was one of several American vessels in which a claim had been reserved for part of the cargo, on farther proof to be made of the national character of G. W. Murray, who appeared in the original case as a partner of a house of trade in America, but personally resident in France. Restitution had been decreed in the several claims to the house of trade in America, with a reservation of the share of this partner. The case was argued on this day, and again, on production of further affidavits, at several times.

JUDGMENT — pronounced November 19th, 1800.

SIR W. SCOTT. This is a question which arises on several parcels of property, claimed on behalf of G. W. Murray; and it is in all of them a question of residence, or domicil, which, I have often had occasion to observe, is, in itself, a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules. The active spirit of commerce now abroad in the world still farther increases this difficulty, by increasing the variety of local situations in which the same individual is to be found at no great distance of time; and by that sort of extended circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (per-

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<sup>1</sup> [Affirmed on Appeal, July 11, 1803.]

<sup>2</sup> [Cases in which the residence of a party has been held to give him a national character, *The Jonge Klamina*, 5 C. Rob. 297; *The President*, 5 C. Rob. 277; *The Matchless*, 1 Hagg. Ad. R. 97; *The Indian Chief*, 3 C. Rob. 12, 22; *The Danous*, 4 C. Rob. 255, note; *The Ann*, 1 Dodd. 231; *The Postillion*, Hay & Marriott, 245; *The Ann Green*, 1 Gall. 274; *The Venus*, 8 Cranch, 253; *The Embden*, 1 C. Rob. 16; *The Falcon*, 6 C. Rob. 198; *The Junge Ruiter*, 1 Acton, 116; *The Citto*, 3 C. Rob. 38. For cases where partners have different domicils, see *The Jonge Klamina*, 5 C. Rob. 297, note. A native domicil is easily restored by return, *The Indian Chief*, 3 C. Rob. 12, note; *La Virginie*, 5 C. Rob. 98; *The Ann Green*, 1 Gall. 286; *The Francis*, 1 Gall. 615, 616; *The Graaf Bernstorff*, 3 C. Rob. 109. As to consuls, see *The Indian Chief*, 12 and 22, and note.]

haps) in America, travel to France, from France to England [ \* 323 ] land, from England back to America \* again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

In deciding such cases, the necessary freedom of commerce imposes likewise the duty of a particular attention and delicacy; and strict principle of law must not be pressed too eagerly against it; and I have before had occasion to remark, that the particular situation of America, in respect to distance, seems still more particularly to entitle the merchants of that country to some favorable distinctions. They live at a great distance from Europe; they have not the same open and ready and constant correspondence with individuals of the several nations of Europe, that these persons have with each other; they are on that very account more likely to have their mercantile confidence in Europe abused, and, therefore, to have more frequent calls for a personal attendance to their own concerns; and it is to be expected that when the necessity of their affairs calls them across the Atlantic, they should make rather a longer stay in the country where they are called, than foreign merchants who step from a neighboring country in Europe, to which every day offers a convenient opportunity of return.

In considering this particular case, it may not be improper to remark, that circumstances occur in the evidence that address themselves forcibly to private commiseration, remarking, however, at the same time, that public duty can allow only a very limited effect to such considerations, and still less to another that has been pressed upon me, that the money, if restored, is to go in payment of [ \* 324 ] debts due to British \* creditors, from the bankrupt estate of this unfortunate person. My business is to inquire whether he is entitled to recover it, without regard to the probable application of it, if it finds its way again into his possession.

Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may, probably, or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may

happen, and, indeed, is often used as a ground of vulgar and unfounded reproach, (unfounded as matter of just reproach, though the fact may be true,) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into [\* 325] a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there must be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business which would not fix a domicile in a certain space of time would, nevertheless, have that effect if distributed over a larger space of time. Suppose an American comes to Europe with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe, with one cargo, and fixing himself there to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile. [\* 326]

The facts of this case are, that three parts of the property claimed on the part of the house of trade of Murrays & Wheaton, in America, have been restored. And the present question arises on the share of Mr. G. W. Murray, in respect to his national character. A question has been made as to his original American character; and it has been contended that he is to be considered as a British subject, trading with France, in violation of his allegiance. But I think the

facts hardly bring him within the reach of this principle. By the affidavits, it appears, that being born in England, he went out very early, destined to settle in America in his childhood; the intention having been fully entertained and decided, at the time of the declaration of independence, and nothing but his extreme youth, or rather childhood, having prevented his migration. This is sufficiently proved. He went out in 1784; and I should hold that he was equitably entitled to the American character. The only question will be, whether he is not to be deemed to have acquired and superadded a French character since that time; and this question must be determined by the affidavits brought in, and by the letters which were on board the ship, and which are supposed to disclose sufficiently the real designs and conduct of the party.

The first affidavit of Mr. J. Murray, the brother of the claimant, annexed to the claim 27th July, 1795, states: "That Mr. G. Murray is not at this time in America; that he came to Europe [ \* 327 ] from New York in January, 1794, as supercargo, \* in a vessel belonging to the deponent's house, and sold the cargo of the said vessel in France, and some time between April and June, 1794, came to England on business of their said house; and from thence, some time afterwards, proceeded to Hamburg; and from thence, in August or September, to Paris, and other parts of France, where the interests of the said house detained him until May last, (1795,) when he came again to England, and has gone again to France, not long since; and has by this time probably left France for Hamburg, where the interests of himself and the house of R. Murray & Co. have called him."

In that affidavit there was no negation of an intention of returning to reside in France; therefore, the property could not be restored. A second affidavit was then exhibited of Mr. J. Murray, 19th August, 1795, negating such an intention, and stating "that the said G. W. Murray has not at this time, as the deponent verily believes, nor ever had, any intention of residing or making his domicile in France, nor in any part of Europe; that the said G. W. Murray, who is the deponent's brother, has been married in the United States, and has one child now there, and that when he came to Europe, early in last year, he did not expect to be absent from home more than six months; but that their said house of Robert Murray & Co., of New York, having made several shipments to France, the said G. W. Murray, on account of the disturbed and critical situation of commerce, thought it advisable to comply with the request of his said house, to stay some time longer in Europe, in order to [ \* 328 ] hasten the sale of the \* aforesaid cargoes, and to endeavor

to close the accounts respecting them, and that the almost total stagnation of all mercantile business in France has prevented a sale being made of the merchandise which is there, belonging to their said house; and the said G. W. Murray did often, while in England, last May, express to the deponent his desire and expectation of returning to his family in America, in the course of the ensuing month of September, but he is prevented now from doing the same, not having been able to close, in France, the affairs of the said Robert Murray & Co., the expediting of which is the sole cause of his being there; and that, so far from his being settled or domiciled in that country, he pays the merchants resident there the usual commission for transacting business of his said partners; that he well knows it to be the absolute determination of his said brother, as speedily as possible, to return to his residence in the United States, but that he, as well as the deponent, on account of the critical situation of their property in Europe, consider it their duty to their partners to be still longer absent from America; but that as soon as the sales of their said property are closed and the proceeds received, it is their intention immediately to return home to the United States."

This matter being left in rather an undeterminate state, as to the time of the return, on the 21st August a third affidavit is brought in, in which Mr. J. V. Murray, "referring to his affidavits of the 27th July and 19th August instant, made oath that, as to the probability of George William Murray's having gone to Hamburg, as stated in his affidavit of the 27th of \* July, his assertion was owing [ \* 329 ] to information which he received a few days prior thereto, that such a step was necessary for promoting the interest of their house; that he now knows that the said George William Murray found it afterwards to be of more importance to the shipments, that his said house had made for him, to stay some time longer in France, and that he did not conceive that his aforesaid assertion had a relation to, or was contradictory to, the wish expressed by the said George William Murray, in May last, to return home in September, as he had found it impracticable so to do, (for the reason stated in this deponent's affidavit of the 19th instant,) before he had any thoughts of going to Hamburg, which last circumstance was mentioned by the deponent merely to show that his said brother was not domiciled in France; and he farther expressly says that the stay of his said brother in France, at this time, is merely on account of the cargoes which had been transmitted before; namely, on the sole account of those cargoes which his aforesaid house had shipped, and which had arrived prior to the date of his first affidavit of the 27th of July; that, so soon as the aforesaid cargoes are sold and the pro-

ceeds received, his said brother will leave France, and will not stay a day longer on account of any other that may be shipped or arrive, or on any other account whatever." On the 26th of August, Mr. George William Murray himself appears, and makes an affidavit conformable to those made by his brother, and stating "that he arrived on Saturday evening last in England, from France, where he

had been, as stated in the affidavits of his brother, James [ \* 330 ] Valentine Murray, for the purpose of expediting the "sales of shipments that had been made by their said house, as expressed in the said affidavits ; and, having perused the said affidavits, dated the 27th July last, the 19th and 21st August instant, he saith that the contents of the said affidavits are just and true, and that his stay in France, as mentioned in his brother's affidavits, was merely on account of the cargoes which had been transmitted before, namely, on the sole account of those cargoes which his house had shipped from America for France, and which had arrived prior to the 27th of July last, being the date of his brother's first affidavit ; that he has no other business or concerns to detain him in Europe but the settlement of the said affairs, namely, the prior shipments deposed to by his brother ; that, should even the said settlement not be accomplished in a short time, namely, within two, or, at the utmost, three months, he must leave them in their present state, in order to embark for the United States, where his presence is absolutely necessary for the interest of his said house." Nothing appears here to show that it was his decided intention to remain in America.

On the 6th of October, 1795, Mr. G. Murray made another affidavit, which states, " That early in the last year he came from New York to Europe. That he had not, at that time, nor has he ever had, or now has, any intention of residing, or making his domicil in any part of Europe. That he has been married in the United States, and has one child now there. That this deponent came to Europe as supercargo of the brig Peggy, belonging to his said house, and did not expect to be absent from home longer than the disposal of [ \* 331 ] the said cargo \* required ; but being unable to get paid for the said cargo, he, in the month of May, quitted France, and came to England, and afterwards went to Hamburg, and again returned to France in the month of September, to endeavor to obtain payment for the said cargo. That during his stay there for that purpose, two other cargoes, the one on board the Mary Ann, and the other on board The Six Brothers, the property of his said house, arrived at Bourdeaux, consigned to Lubbert and Co., and at the request of the said house, and on account of the disturbed and critical situation of affairs in France, was induced to prolong his stay there



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to expedite the sale of the said cargoes, by the said Lubbert and Co., (who were to be paid a commission on the said sale,) and to close the accounts respecting the same. That the house in America supposing the deponent might be detained in France on the aforesaid concerns, until the arrival of some of their subsequent shipments, thought it prudent, lest their former agents might not be in a responsible situation, on account of the fluctuating state of affairs in France, to consign the said cargoes to the order of this deponent, or to his assigns; the said house presuming, that if this deponent had quitted France, he would have left an authority with some respectable house for the receiving and disposing of the said cargoes." That he had fixed various times for quitting France and returning to America, might be; but as to any purpose of coming to England not created by the capture of the cargoes, he says nothing; that he would have otherwise come, is not at all expressed in, \*or to be in- [ \* 332 ] ferred from these affidavits. However, he avers fully, his intention of returning to America. There is not the least intimation given of any intention of returning back again to France, and any one would suppose that he had thrown up the business of these two cargoes, and was fully bent on making his final settlement in America, without casting an eye back to France.

The letters that were found, however, on board one of the ships, The Jefferson, express somewhat of a different purpose, and state that it was necessary for one of the partners to reside in France for some time. The case which these letters rather intimate than disclose, is, that the two brothers, James and G. W. Murray, were to come to Europe to be differently distributed in England and in France, to conduct the affairs of their house; when I say this, I speak rather of the intention and wish of the partners in America, as it appears in their correspondence, for the letters are all from them. There is not one letter introduced from either of the Murrays in Europe; and therefore, it is open to an observation on one side that the Murrays in Europe possibly might not concur in this intention, as it is on the other that it is highly improbable that such a plan should be so strongly in the contemplation of the partners in America, and that they should be writing to these gentleman on the prospect of a constant residence in Europe, without any privity and concurrence on their part, and whilst they were intending a speedy return to America. Now, supposing this to have been the case, and that there was an intention on the part of Mr. G. Murray, of fixing his residence in France, in the \*same manner as Mr. J. [ \* 333 ] Murray has resided here in Great Britain, I cannot accede to what has been advanced in argument, that it would not fix on

either of them, a French or British character. If a house of trade sends a partner to France with an intention even of not mixing in any other trade than the business of that house; yet I think that such a circumstance, connected with a permanent residence in France, would impress a national character upon him. It appears that Mr. J. Murray, the brother stationed here on the same sort of footing, has been considered by the common law of this country; as a British trader, subject to the bankrupt laws of this kingdom, and as such, a commission of bankruptcy has issued against him; and on the same reasoning, if Mr. G. Murray has been resident in France during the greater part of the war, conducting the business of his house, receiving cargoes, and disposing of cargoes, and giving accounts of the markets in France, and directing mercantile adventures there, it is, in my apprehension, impossible not to consider him as a resident trader of that country.

Amongst the letters, there are many, which it will not be necessary for me to go through. It will be sufficient to state that they all concur in expressing a general expectation that these persons would be resident in Europe. The expressions are various in the different letters; but they all concur in pointing to the purpose of a general and continued commercial agency in Europe. In The Jefferson, they write, "we draw on your capital in Europe," speaking of it as if

it were a distinct establishment; and there are, besides, several passages to the same effect. "It will \*enable us to form some plan for our next winter's operation." "Advice respecting contracts with government; and a recommendation to purchase prize ships." "We may look forward to a time not very remote, when the genius of liberty will bear down all its opponents, and create a crush in commercial Europe, never before experienced. In such an event, we are better circumstanced than most others; as everything being under your immediate direction, will prove a great security." "Other friends hope to be benefitted by your success and industry in Europe;" all showing, on the part of them in America, a strong expectation either that Mr. G. Murray would be long resident in France, or that he would have made provision for the dispatch of their business there. At the same time, it is not to be denied, that there are some passages which intimate a designed return to America. There is a passage in a letter from Mr. R. Murray to his brother George, (dated New York, March 27, 1795,) alluding to the settlement of affairs: "I mean to take up our books, to get in forwardness the object of a general settlement which we all wish to have effected soon after your return:" and there is a reference likewise to domestic incidents; one (sufficiently affecting) with respect to his favorite infant

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child, expressing a hope, "that he would be able to articulate, and bid his father a welcome on his return." These are represented as inconsistent with the view which I am disposed to take of his intention; but by no means. I think it is perfectly clear that Mr. G. Murray meant to go to America; and he is entitled to the full benefit of that fact. The \*misfortune is, it is equally clear that he [ \* 335 ] intended to return again to Europe, and with that intention pointed particularly to France. I do not say that a return to France for a short space of time would have affected him; but it must depend on the time, and on the nature of his residence, after the return, whether it will have that effect or not; because, if it should appear that he went to America merely for a short time, and then returned to France, it can hardly be considered as a legal interruption of his residence in France. His return will connect itself with the former residence, and it must be taken altogether, as constituting, in law, a continuation of the general residence in France. The fact is, as it appears from the affidavits of Mr. Charles Murray, (another brother of the claimant,) 5th July, 1799, and 30th October, 1800, (for Mr. G. Murray has not thought proper to give us any information,) that he returned to France in June, 1796, and that he staid there at least till August, 1800, the entire space of four years and more. Perhaps it would not be too much to say that there is no definite satisfactory proof that he has, even at this moment, quitted France. His own letter, dated Bordeaux, 22d of August, which has been brought in, states, "that he had taken his passage on board the Franklin;" and another letter, not from himself, but from Mr. Barnet of Bordeaux, dated August 27th, to Mr. Charles Murray, says, "that he had embarked, and was to sail to-morrow," and there his history ends, no proof whatever being offered that that ship, carrying Mr. Murray, did sail. I have no evidence beyond the letter purporting to be the letter of a French merchant, that he had \*taken [ \* 336 ] his passage in a vessel which was so expected to sail.

This is the whole evidence, excepting the belief of Mr. C. Murray, "that he is actually gone;" and when I recollect that Mr. C. Murray, in an affidavit<sup>1</sup> made January 20th, 1800, supposed him to be at

<sup>1</sup> "That in the month of October last, he received a letter from the said George William Murray, who was then in Hamburg, informing him of his arrival there, and expressing his intention of writing again soon; which letter, this deponent does not now annex hereto, as it relates to private concerns, wholly unconnected with this, or any other cause in this court, in which the said George William Murray is interested; but, in case the court should require it, this deponent is willing to satisfy it as to the place and time of the date of said letter. That since the receipt of the said letter, he has not further heard from the said George William Murray; but by a letter he

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Hamburg or Sweden, in January, and ready to depart for America, and that six months after this, the captors find in a paper on board *The Clarissa*, and signed by him, March, 1800, that he was remaining in France at that time, giving all credit to the sincerity [ \* 337 ] of Mr. C. Murray's deposition, I cannot take \* it as a fact clearly proved, that he is gone to America, much less to remain there. Taking it, however, most favorably, that he has actually withdrawn himself in 1800, there is a fact of residence from June, 1796, to August, 1800, (above four years), connected with a residence of above a year, before his return to America; and that return, accompanied with a purpose of coming back to Europe, that remains to be explained. Whether any explanation could be given of such a residence so long continued, is, upon the principles laid down, somewhat questionable to me. Time, I have said, is a great agent in these matters, and I should have been glad to have heard any instance quoted, on the part of Mr. Murray, in which a residence of four years, connected with a former residence, and which I must consider as a legal uninterrupted residence, was deemed capable of any explanation. But supposing it to be so, it must at least be required, that the explanation be, first, clear and satisfactory in itself; and, secondly, supported in a satisfactory manner. What is the explanation of this residence? The great point to be explained, will be the employment of that long continued residence. Was it a residence utterly unconnected with any mercantile operations at that period? The affidavit of Mr. Charles Murray, 5th July, [ \* 338 ] 1799,<sup>1</sup> states, that his brother went to America in \*1795, to conduct some operations which the high price of markets

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received soon after from James Valentine Murray, he mentions the expectation of the said George William Murray's proceeding to Sweden. And in another letter received a few days since by this deponent, from the said James Valentine Murray, dated 3d of December last, he informs this deponent, that it was probable the said George William Murray would now shortly return to America; and this deponent, from these circumstances, and well knowing the anxiety of his brother, the said George William Murray, to return to his wife the first moment in which circumstances would admit of it, is induced to believe that the said George William Murray, if he has not already quitted Europe for America, is now on the very point of so doing."

<sup>1</sup> Affidavit in which Charles Murray, referring to conversations with his brother in September, 1795, says, "That George William Murray's statement was, that although the interests of his house were, at that moment, somewhat injured by the capture and detention of several of their cargoes, by British ships of war, (of some of which captures, the said George William Murray was informed while at Norwich), yet he considered that as a temporary inconvenience only; that the then state of markets in Europe suggested some operations which he conceived would be highly advantageous to the house, in the conducting of which his presence in America would be necessary,

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suggested, and with hopes of \* returning to England the [\* 339 ]  
ensuing spring, for the purpose of winding up and settling

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and that accordingly he intended to sail for that country in the next month, and hoped by the ensuing spring to be able to return to England, for the purpose of winding up and settling the whole of the concerns of the house in Europe; and that in the event of such a settlement, it was his, the said George William Murray's intention, and that of his brother, the said James Valentine Murray, to make America their sole place of residence in future. That in part pursuance of the said George William Murray's intention as aforesaid, he sailed for America early in the month of November, 1795, and arrived there in the following month; that after his arrival, his said house of Robert Murray & Co., purchased several cargoes consisting chiefly of rice, and consigned the same to England for the purpose of being sold here, or forwarded to some other European market, as might be found most advisable; and the said George William Murray (as this deponent believes) in further pursuance of his aforesaid intention, after completing the most of the said purchases, returned to this country again in the beginning of May, 1796, for the purpose of superintending the sale of the said cargoes, they for the most part being consigned to him. \* That on the arrival of the said George William Murray here, he found that an immense loss must arise upon the said expected cargoes, besides which, a considerable derangement in the affairs of his house had occurred, arising, as this deponent has been informed and believes, principally from the delay in payment of very large sums due to the said house from the French government, and also from the above-mentioned capture of this and several other ships, laden with cargoes of provisions, belonging to the said house, by British cruisers, which cargoes were bound to France, where they then bore great prices; and it being represented to the said George William Murray, that the most outrageous threats had been made against him by persons in London, holding bills of the said house, he conceived it most prudent, and was advised, not to expose himself to them until the funds of the house should be so centred in this country, as to enable it to face its engagements; and accordingly the said George William Murray, having first transferred the management of the sale of the said cargoes then expected to arrive here, to Messrs. Bird, Savage, and Bird, of London, the mercantile correspondents of the said Robert Murray & Co., he soon after went to France, in order to use his utmost endeavors to procure payment from the French government, and to arrange other outstanding concerns of the house in that country, with the intent to remit such sums as he should receive to the said house of Bird, Savage, and Bird, and not with any intent of settling as a merchant in France, or of employing the funds which he should so collect there, in any manner whatever in the trade of that country. That certain creditors of the said Robert Murray & Co., at Hamburg having laid attachments on all the property of the said house in France, of which the said George William Murray would otherwise have had the control, the said George William Murray was thereby rendered unable to fulfil his said intention of remitting funds from France to this country, and the said Robert Murray & Co., have never since been able to obtain the command of that property. That if no other circumstances had rendered the return of the said George William Murray to America unsafe, he would have returned thither long ago, but the creditors of his house in America having thrown Robert Murray, one of the partners into confinement, the other partners were unwilling to expose themselves to the like violence; and this deponent believes that the residence of the said George William Murray in France, at any time since the said capture, was solely a matter of personal and temporary convenience and necessity, arising from the said circumstances of the

[ \* 340 ] his concerns in Europe ; \* and it is said, in argument, that these operations in Europe, are to be exclusively confined to operations in England ; and that some cargoes of rice did actually come to England. But I cannot help thinking that, if so, it was an unfortunate circumstance that he did not come himself, except for a very short time ; for, as the matter stands now, it affords a suggestion that these operations were to be extended to France full as much as to England. It appears, besides, that the rice was destined " to England or some other European market ; " therefore it is not impossible that, even this rice might have found its way to France. The affidavit states further, " that his return to America was delayed by waiting for payment from the French government." Now, I must ask, what was this contract with the French government ? There is nothing in his own affidavit which points to any other transactions than those respecting the cargoes of the ships Mary Ann and Six Brothers that remained unsettled.

The affidavit states further, " that he was alarmed by the outrageous threats of his creditors in this country, and that he was advised to go to France," as he actually did in June, 1796, and the affidavit concludes with a belief on the part of Mr. Charles Murray, that his brother was not in France in a mercantile character or for any mercantile purpose.

[ \* 341 ] \* When I find that he went there as a mercantile man, that he stayed there four years, and that he was a man who came from America for the very purpose of mercantile operations in Europe, I feel a difficulty in saying that (exclusive of all trading,) satisfactory reasons are assigned for it. Or supposing him to have gone to France, for the purpose of obtaining payment, I should still find a difficulty in saying that the original purpose could privilege a residence of four years. Is it possible for me to say, then, that the explanation which is given in this affidavit is quite sufficient, supposing that no objection lay to the mode in which it is offered ?

And I come now to observe on what I consider as the fatal objection, that the whole depends on the single affidavit of Mr. Charles Murray, the brother. There is not one word coming from Mr. G. Murray himself, to show what was the nature of his connection with France. Surely the information of Mr. Charles Murray is very

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debts due to his house from the French government, and the unfortunate derangement of the said Robert Murray & Co.'s affairs ; and that such residence was not in anywise " the purpose of trade or connected with trade, save as aforesaid."

incompetent. A striking instance of his incompetency is, that he supposes his brother gone to America, when it appears that, months after that time, he was living in France. Can I suppose him sufficiently instructed, as to all the courses of his brother's proceedings, to enable him to state satisfactorily to the court the nature of his engagements in France? It is impossible that the court can take the account of such a person, that the residence of his brother in France was not connected with any mercantile engagements, unconfirmed as it is by the gentleman himself, who, though at hand, as I may say, and in a neighboring country, has not thought fit to give us any explanation. He knows the course and nature of his own transactions, and yet he expects restitution, with- [\* 342] out taking the trouble of making so much as an affidavit for the purpose. After six years' residence (as I must deem it,) in France, and with all possible opportunity allowed him for that purpose, — from October, 1795, not a single word comes from him till the present day, in November, 1799. I own I think it impossible that the court can be expected to restore on this evidence. Taking it on the present evidence, as to the sufficiency of the explanation and the mode in which it is offered, it is impossible.

Then the only question is, whether I shall allow further opportunity to the party, and give time for farther explanation? Considering the length of time which the cause has continued before the court, with a degree of indulgence, perhaps, open to some complaint on the other side, and the manner in which it has been put off from month to month, I do not think it any part of my public duty to allow such opportunity. I do not say that, before another court, Mr. Murray may not supply the defects of his case, and by his own evidence; but finding myself under the necessity of determining on the evidence now before the court, which is, as I have before stated, that Mr. Murray has been in France four years, at least, and that connected with a former residence there, and that there is no direct proof that he has now quitted it; I feel myself under the necessity (which, if I might be allowed to speak as a private person, I should, perhaps, describe as a painful necessity,) of condemning his share of the property in these several cargoes.

[ \* 343 ] \* THE ROSALIE AND BETTY, Gebhardt, master.<sup>1</sup>

February 5, 1800.

A case of property, connected with circumstances of fraud. Effect on allowance of farther proof. Condemnation.

THIS was a case of a ship and cargo, taken on a voyage from the Isle of France, as asserted, to Hamburg, 31st May, 1799. The ship was claimed for Mr. Baurman, of Embden, and the cargo for Mr. Kaster, of Hamburg.

JUDGMENT.

SIR W. SCOTT. This is the case of a ship and cargo, taken on a voyage from the Isle of France, as asserted, to Hamburg, and the question is, according to my view of it, a question of property. For I am of opinion that the question, as to the legality of the trade, does not arise; as the cargo, being intended for the port of the owners of the cargo, is entitled to the favorable construction of that order of council,<sup>2</sup> which permits the trade of neutral vessels from the colony of the enemy to their own ports. Till I am better instructed, I shall hold that the right to engage in such a trade is not vitiated, on the part of neutral merchants, by the circumstance of the cargo being put on board a neutral bottom of another country, and coming to the port of the claimant of the cargo. I have taken some time to consider this case, because it is a case of great value, and has been very laboriously argued, and because, as I understand, there are other cases of a similar nature, which are likely to come before the court; and it may save time to deliver the opinion of the

[ \* 344 ] court on what \* will be the effect of similar evidence and similar circumstances in those cases also, if they occur.

In considering this case, I am told that I am to set off, without any prejudice against the parties, from any thing that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one till the fraud is actually apparent. This is undoubtedly the duty, in a general sense, of all who are in a judicial situation; but, at the same time, they are not to shut their eyes to what is generally passing in the world,

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<sup>1</sup> [Affirmed on appeal, May 6, 1802.]

<sup>2</sup> 25th January, 1798. See Appendix, p. 2.



— to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial. Higher prices are given for this secret and dishonorable service, and greater frauds become necessary. Old modes are exploded as fast as they are found ineffectual; and new expedients are devised to protect the unsound parts better from the view of the court. Not to know these facts, as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject upon which the court is to decide; not to consider them at all, would not be to do justice. The very nature of the inquiry necessarily suggests something of this kind; for the inquiry is to see whether the property does, *bond fide*, belong to those who are ostensibly represented to be the proprietors. It is an inquiry, therefore, which is necessarily attended with some doubt *in limine*. No reasonable man will say, that the court is to look at cases in the same manner where no special reason for fraud exists, and where the enemy is driven to it by a necessity that is notorious, as the only means of getting home his property; and when \*such artifices are [ \*345 ] not unfrequently known to prevail, and more especially.

when the persons, appearing as claimants, have been exposed to the experience of the court, as having engaged in such a trade, and do not stand before the court with those general credentials which belong to the conduct of a pure and unimpeached neutrality. I am afraid the observation of those who attend this court will apply these remarks to the owner of the ship. The claimant of the cargo has not, in my recollection, appeared before the court on any former occasion. I do not say that the conduct of the owner of the ship will, in general, affect the cargo; but if the parties appear bound up together in an intimate connection and coöperation, in measures which a court cannot see without disapprobation, such a concurrence cannot but form a foundation for the unfavorable reception of the case of a party so connected in that transaction.

The case sets off in a manner attended with much suspicion. The ship is a Danish ship, asserted to have been purchased on a voyage from Riga to Bordeaux; but there is no evidence on board that points to it, except the mere recital of a bill of sale. The first evidence that we find respecting the vessel, represents her as lying in a French port; and the master cannot say any thing of the purchase, or of the built, or former employment of the vessel, he being, according to his own account, not acquainted with her. The carpenter, however, and the second mate, describe her as French built. The master and the whole crew were sent to Bordeaux, to take possession of the ship, although she is represented as a neutral vessel

[ \* 346 ] before; and the former crew, though neutrals, are \* not employed, except in one or two instances, in consequence of the illness of some of the new crew. Who is the master? He is represented as a Prussian; but, in a paper invoked from the *Julie*, he appears to have been habitually trading from Bordeaux, and, I think I may infer, habitually trading to the Isle of France, — because the letter of recommendation which he carries with him speaks of him as an old acquaintance,<sup>1</sup> and as a person not unknown there. There is the old measuring bill on board, which, if it applies to this ship, describes her as a Danish ship; but how this came to be detained alone, and no other papers, does not appear. The fact is, however, that the ship is first produced to the notice of the court lying in a French port, and with a new crew, and the master unacquainted with her former history. I cannot help thinking there is an appearance of something like industry, or *astutia*, used, to withdraw from the court circumstances of which it ought to be apprised.

With respect to the cargo, it is exposed to these general observations: That it is put on board in a French port of the East Indies, being the proceeds (for I must take all the circumstances together,) of a cargo put on board in a French port in Europe, not in return for any cargo sent from Hamburg to Bordeaux, but as an [ \* 347 ] original shipment in a French port, \* to be delivered at the Isle of France. It will be proper for me to consider, also, an observation made on the circumstances under which this cargo was taken. The ostensible destination is represented to be to Hamburg, undoubtedly; and it has been pressed upon me that the place of capture, on the English coast, near Dartmouth, confirms this account, and shows that the return was not to Bordeaux. It is not clear, however, from the place of capture, that the vessel might not have found her way into some French port in the channel; considering the situation of Bordeaux, it might be thought too hazardous an enterprise to attempt to get to that port, on account of our fleets and cruisers. It is not clear, therefore, from this account, that the return might not be to a French port; taking it, however, otherwise, and supposing the destination to be to Hamburg, it is said to be a strong proof of the neutral property. But I think that does not amount to much, considering the circumstances of the times and the exposed

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<sup>1</sup> Letter from a merchant at Bordeaux to Mr. Delos, to the care of a merchant at the Isle of France, after mention of several letters which he had written: — “ Since which I have written to Mr. Bedel, by a Prussian ship; and though the captain, Gebhardt, is an old acquaintance of mine, I fear he has acted with my letters as they do in general.”

state of the French ports. If they were not attainable, the next best expedient would be to get the property to a neutral port; and, therefore, I think that circumstance will not weigh so much as it might at a time when the ports of France were open. So much for the observations arising on the surface of this case. I think it is one that obliges the court to look with some suspicion, — I do not say to employ any thing of *astutia*, in opposition to the *astutia* employed against it, (for *astutia* does not belong to a court of justice,) but to exercise its vigilance; and I think I violate no duty in coming to the inquiry with a certain degree of jealousy, \* which [ \* 348 ] the appearances of the case and the general conduct of the parties have contributed to raise. The material object of inquiry, I think, will be, whether it was the intention of the parties to impose on English cruisers and English courts of justice, in the original shipment to India. This is important on two points: first, because, as the present cargo is the proceeds of that shipment, if there is reason to presume, from the fraudulent manner of the transaction, that there were French interests concerned in that cargo, there will be great reason to conclude that the same French interests have travelled throughout; and, secondly, for the purpose of ascertaining the good faith of the agents; because, if I discover a deep-laid artifice in the original transaction, it will be difficult to persuade me that the parties are entitled to the credit of ingenuous dealing in the subsequent parts of the transaction. The two leading facts are, that the ship went from a French port to a French settlement; and that the cargo was there disposed of in the French colony. To prevent these acts from being considered as fraudulent, one of these two things must be shown: either that the destination was avowedly and openly professed, (for, in such a case, although the trade might be held illegal, it would not be fraudulent,); or, secondly, that if the ship did not go with this avowed destination, she went thither under some urgent and supervening necessity. Because if it was the original intention of the parties, and that intention was dissimulated, it must be considered as a fraud; and that fraud more noxious, on account of \* the contraband nature of several of the articles [ \* 349 ] of the outward cargo.<sup>1</sup>

On the first point, an open and avowed destination to the Isle of France, there can be no dispute, as every paper points to Tranquebar,

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<sup>1</sup> The general cargo consisted of a large variety of assorted articles. Amongst these, — Nine cables and twenty-six small ones, six kedge anchors, seven hundred and four bars of iron, one hundred and sixty-three bundles of hoop, round, and square iron, six casks of ship tar, two hundred casks of pitch.

and to no other place, except the certificate granted at Hamburg, on the oath of Mr. Baker, which is referred to as stating a destination to the Isle of France. But unless that can be proved to have been on board in the outward voyage in a producible form, it might as well have been a thousand leagues off; and if it was not, there is nothing to show even a contingent intention of going to the Isle of France, and therefore, the destination must be deemed dissimulated. That the certificate was on board in a producible form, can, I think, hardly be maintained; for the master was wholly unacquainted with it, and speaks entirely of a destination to Tranquebar, without any reference to the Isle of France. That it was not produced, appears also from two instances, in which this ship was met by English cruisers and examined; and it is hardly credible that if such a paper had appeared, a cruiser would so far have forgotten his own interest, as well as his duty, as not to have brought the vessel in for adjudication.

I am, therefore, forced to conclude that this paper could not [ \* 350 ] be on board in any form that \* made it producible as a ship's paper, during the voyage.

This brings me to the second point, whether the vessel was driven to unload in the Isle of France by any emergency arising out of the circumstances of the voyage? It is said that the parties had a right to clear out for Tranquebar, reserving to themselves a liberty of touching, in this manner, at an enemy's port, for the purpose of refreshment. But I say, that if there is such a reservation, it ought to be expressed in the ship's papers; it can least of all be admitted in a case where every thing points to a neutral port; where the consignee is regularly described, and where every attestation and oath in the case, points to a neutral port only. As to any plea of necessity that can be set up to justify such a deviation, there must be two necessities shown, one creating an obligation to go into that port, and the other, an obligation to sell in that port; for this last is the criminal act, constituting the fraudulent departure from the intentions which are held out in every paper in the case. It is said that this deviation was occasioned by a want of water, and the leaky condition of the ship. The experience of the court does not induce it to hear these excuses with any great respect, especially when there is no intimation in the papers of any such deviation. It does not appear at what time the failure of water was perceived, whether before the ship reached British ports or not, or whether due diligence was used to supply it; therefore of this I cannot judge. But of damage done to

the ship I see very little, and that, not till she approached [ \* 351 ] very near the Isle of \* France. That there was any leakage, I do not find in any part of the journal, and in respect to one

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passage, in a paper relied on, I am convinced by looking to the original, that it refers only to the sea breaking in at one of the port holes; and that no damage had been sustained in the body of the ship. It is still further proved by the nature of the very slight repairs which the ship underwent at the Isle of France; but giving them the full benefit of this pretence, does it follow that the ship could not have proceeded to Tranquebar? On this point I have the best witness in the world, the carpenter, who says, "she might have gone on, that the repairs might easily have been made, and water supplied, and four or five Lascars easily procured in the place of some of the sailors who were ill;" (whose illness is represented as a general sickness of the crew, affording another pretence for this deviation.) Then, as to necessity of selling the cargo at the Isle of France, I do not see that it is even pretended; it is only said that the opportunity of a better market presented itself. Now, on this part of the case, it may not be unnecessary to look to the authority under which the sale took place; because if it was done by the master, without any authority from the owners, it might be too hard to press the fraudulent conduct of the master, in respect to the cargo, to their disadvantage. What says the master? He speaks, indeed, to this effect, and does not pretend to have had any dominion over the goods, but admits himself to be a mere carrier-master; and to have taken on himself to dispose of these goods, without the privity or direction of the owner. But is this true? It is admitted, because it cannot be denied, that there had been an actual authority over this vessel \*pre- [ 352 ] viously lodged in Mr. Saulnier, who appears to have been the great manager of frauds at this place, in the same character in which Mr. Wilkins Andre has appeared at Surinam. The authority of Mr. Saulnier is signed before the master leaves Europe, yet he represents himself to be entirely ignorant of it; so that on the claimant's own showing, the case stands thus: That if by any accident the ship should come into the Island of France, there was an authority given to sell the cargo, and take in another for Europe; yet the master received no intimation of these orders, and when at last he actually proceeds to sell the cargo, he does it on a mere speculation of his own, without any authority from Europe.

Looking no farther, it is impossible not to come to a conclusion on this part of the case, that it was a fraudulent transaction; for, taking it at the weakest, there was a possible contingent sale at the Isle of France provided for, without any appearance of such a purpose in any of the papers. But is not the court bound, by all fair rules of evidence, to go farther, and to ask whether the intention was not entirely confined to the Isle of France, without any view to Tranque-

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but, except for the purpose of covering the real nature of the transaction? It has a right to infer this, and to presume every thing against a case in which so evident a suppression of a material truth has already appeared; and this suspicion is still farther confirmed by the other circumstances of the case. In the first place, we find that the authority was signed at Hamburg, before the sailing of this vessel:

yet the master is left in entire ignorance, to be surprised with [ \* 353 ] the first view of these instructions on his arrival in the Isle of France. Is it nothing that it is a shipment from Bordeaux ostensibly to Tranquebar? Is the communication between those ports so open, and so much in the ordinary course of trade, as to afford no ground for suggesting that it was from the beginning, a false and colorable destination? and for supposing that the vessel would not reach Tranquebar without first finding her way into a French settlement? more especially after it has appeared that this fact did actually take place. Again, there is a letter from Mr. Saulnier to the shipper of the outward cargo at Bordeaux, showing that they were in the habit of sending backward and forward to each other. Is it not natural to expect that the master would have written to his employer, informing him of the necessity that he was under to deviate into a French port, contrary to his destination, and to sell his cargo there? He is directed "to write on his arrival at Tranquebar, that half of the freight might be paid." Would he not feel the same necessity for writing from the Isle of France? Yet, if I understand the master right, he says, on the 23d interrogatory, that he has not written any letter to his employers. Who is the master? He appears evidently, by the letters, to be a person well known at Bordeaux, and to have been employed in the Bordeaux trade to the Isle of France and other French settlements. What has been the conduct of the master? It is said, and truly said, that in various parts of his evidence he is a gross falsifier, so as effectually to discredit his own testimony. But will this stop here? I apprehend not: it goes much

further and extends to the character of his employer: for [ \* 354 ] will a master prevaricate so grossly as "this man does. I cannot suppose that he would be a voluntary falsifier, or that, without instruction or subornation, he would do so. He is, therefore, a party to a fraud. I cannot help thinking that some circumstances of this kind or has been such as will reasonably lead to the conclusion of a conspiracy of his employers. The very evidence which is so grossly contradicted, is in my apprehension a very strong presumption of such a conspiracy, and went out purely to the intent of covering the truth, and of procuring a sale of the cargo in the Isle of France. The very next matter in the evidence is the resolution of selling his cargo

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The Rosalie and Betty. 2 C. Rob.

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Was it not natural that he should at least have taken time to reflect whether it was possible to go to Tranquebar? Would he, at the very instant almost, a few hours after his arrival, have come to the resolution to sell there, in violation of his own engagement, and of the instruction of his owner, unless he had set out with some secret order to that effect. The letter of authority is not produced; but it is said the parties are ready to produce it, and I have no doubt of it. The very celerity with which the business was transacted, leaves me no reason to suppose that the persons who were concerned in it would leave that master-stroke of fraud unexecuted; and it is very probable that they might suppose it would come with more credit, if called for in this manner, than if it had appeared originally among the ship's papers. The letter of Mr. Henrickson gives us reason to conclude that the same bye conveyance which carried the instructions to Saulnier, would carry directions to him, respecting the best manner of supporting the \*whole of these fabricated proceed- [ \* 355 ] ings in case it should be wanted.

Taking all the parts of the transaction together, I have a well grounded conviction that the Isle of France was the original destination; and that there was a fraudulent suppression of that circumstance. Then who were the parties to this fraud? The owners of the ship, and of the cargo. The instruction to Saulnier must have come from the owners of the cargo; and it is impossible that the owner of the ship should not have been apprised of so material a deviation from the terms of the charter-party; besides, the master is the agent of the owner of the ship, so as to bind him; and it is hardly credible that he could have undertaken so material a variation without a full assurance that he would be supported in it. As to saying, that this part of the voyage was a past transaction, I must deny that; for it is an entire contract, of which one part is, that the returned cargo should be taken in at Tranquebar. It is not a detached voyage, commencing without any connection with the outward cargo; but it is one entire transaction, of which the former part links in with that which is to follow;—a transaction, which is false in two of its terms; false in the original destination, and false in the representation that the returned cargo was to be taken in at Tranquebar. If this is the case, the legal conclusion will be at no great distance; because, if the proof of property in this case is not sufficient, the parties have forfeited the right of supplying farther evidence; and they must stand or fall by the original evidence of the case.

With respect to the ship, she appears first in a \* French [ \* 356 ] port, for I cannot take the mere recital of a purchase as any proof; the pass is not on the oath of the owner, but on the master,

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The *Rosalie* and *Betty*. 2 C. Rob.

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who knows nothing of the transfer; and when I look at the contract of sale, it appears very unnatural that some part of the money should be paid beforehand, whilst the ship was *in itinere*; and under a condition, that the money should be returned with an interest of four per cent. if the vessel did not arrive. Certainly, this is not a very common mode of transfer; and I think I can see a reason why the payment is put forward in this way; because if no money had been paid, it might be thought that this court would not consider it as an executed sale. That a merchant should actually advance money on such terms, when so much better interest might be made, is not very natural; it is certainly not the habit of that body of gentlemen to do so; and this objection is still farther confirmed by the terms of the attestation:—"as long as the vessel shall continue in our employment." It is an attestation merely present, and every thing points to a suspicion that there was merely a temporary shifting of interests, and a handing over, in this asserted transfer; and if it was before a Danish ship, one need not look far to find a reason for this: because, if a cargo was to be carried to the Isle of France, of the nature of contraband, it might be a very hazardous adventure for a Dane to undertake, as expressly prohibited by his own treaty. This supposition is still farther aided by the instructions given by the owners to the master; for without any probation, (and with so little acquaintance between them, that the master does not know the [ \* 357 ] form and style of his employer's house of \* trade,) they bind themselves down "to employ him as long as the vessel shall continue in their possession." That they should bind themselves in this manner to a mere stranger, is not very probable: whether it is in a French or Danish interest, it is not necessary for me to inquire: it is sufficient that the property is not proved, to my satisfaction, to belong to the person claiming it in these proceedings.

In respect to the cargo:—How is that proved to be the property of Mr. Kaster? It is asserted in the documents, and in the same instruments that describe the outward voyage as being to Tranquebar; can the court admit as complete evidence of the property, those documents, which it is bound to consider in regard to the destination, as totally false? The destination is described to Tranquebar. Is not that a fraud? Or is it to be allowed to a party to say, "It is true, I have been found in an untruth in this part, but in all other parts, give me the benefit of a fair claim." The inference is not, that

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<sup>1</sup> The master described himself in fourth interrogatory, as being appointed to the command by Jean Baerman & Son, whereas the house of trade is Hillary Baerman & Son.



all the other documents must be necessarily false; but it renders the truth of them questionable, certainly, in the extreme. Again, in respect to the instructions to the master, do they not throw discredit on the claim for the cargo? Suppose the contract of the charter-party to have been executed for the outward and homeward voyage; would it not be natural to express it in the instructions to the master? Is it to be said, that the master had an opportunity of verbal instructions, and, therefore, that he was at liberty to depart from the terms of his written instructions? As far as I understand the instructions, they seem to me to refer to another transaction. The master arrives at Bordeaux in January. The lying days, and the state by which he describes his arrival at Bordeaux, do not agree. The instructions direct him to take a cargo on freight, on the part of a neutral merchant. Would it not have been natural to have repeated the terms of the charter-party, and to have told him that he was to look to that, by which the hull of the ship was bound to Mr. Kaster? Instead of that, his instructions are "to go to Bordeaux, and there take a freight on the part of neutral owners." So much for the evidence of the papers. But supposing them to be liable to no objection, in what manner are they verified? The master does not know the name of the lader; then in what way can I give him credit for what he says, that the property belongs to a person at Hamburg? The numerous prevarications in which he is detected, deprive him of any right to be believed; and they will not only affect his personal credit, but they must fall also, in some degree, on those by whom he was employed in this transaction. With respect to the real foundation of this business, it is not perhaps very easy for me to develop it; if it is really a Danish ship, my own opinion is that it has been handed over for the purpose of carrying out contraband articles to the French settlement; and as to the cargo, when I see the outward cargo carried to a French settlement, and there delivered to Saulnier, who is the great agent of frauds there, and with much contrivance, connecting all the circumstances of French agency, throughout the whole transaction, I cannot think that it is wholly unconnected with French interests. In what degree they are mixed in it, I cannot say; but it is my comfort to think, that it is not necessary for me to determine that point; for if Mr. Kaster has any property in this cargo, if he has mixed his interest in any proportion with the interest of the enemy, and resorts to modes of prevarication to conceal and protect the enemy's interest, such a conduct will affect his own share. If neutrals will not bring their claims fairly and ingenuously before the court, but resort to such artifices to cover and protect the property of the enemy, it is a

rule of the law of nations that they shall be condemned by the proof they bring. I shall therefore not decide this case on the affirmative ground, that this ship and cargo are proved to belong to the enemy; but on the ground that the property in them is not proved to belong to the persons claiming them before this court: and that if it is their property, they have clothed it with such circumstances as justify exclude them from the opportunity of giving further proof. I wish neutrals to understand, that if they mean to avail themselves of the rights of neutrals, they must conduct themselves as such. It will then be the duty of this court, and the ambition of it, to exert its utmost vigilance to give them the benefit of their neutrality. But on the other side, if they discredit their cases by a clothing of pervariation and falsehood, who is to blame for the inconvenience that may ensue? The rule of this court is, and framed with as much moderation surely as the subject will admit, that if their proofs, [ \* 360 ] dishonored \* by such impure mixture, are nevertheless sufficient to establish the truth of their claim, it is well: but if they fall short of this, (and it can hardly happen otherwise,) they shall not be indulged with the means of supplying proofs from sources which have appeared to be corrupt.

Ship and cargo condemned.

*Laurence* submitted it to the consideration of the court, whether it would not be proper to make some alteration in the ordinary form of the sentence. That in this instance, it would express the direct contrary to what the court intended to deliver as the grounds of the decree.

COURT. It is not in my power to alter the form; it has been under the consideration of the Superior Court, and they have declined to do it.

*Laurence*. I was not aware that it had been under the consideration of the Superior Court. The inconvenience arising from the usual form is, that although we understand the terms as so general and comprehensive, as to extend also to other grounds of decision than those specifically mentioned; other courts, which have frequently occasion to interpret these sentences in case of insurance, &c., bind down the cause of condemnation to the terms of the sentence.

COURT. I shall be very willing to give any relief in my power.

[ \* 381 ] \* The *Registrar* said that there had been certificates given, in one instance by himself, with which another court was satisfied.

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The Polly. 2 C. Rob.

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## THE POLLY, Laskey, master.

February 5, 1800.

Colonial produce of the enemy imported into America, and afterwards sent on to Spain ; legality of such a trade on what considerations depending. Restitution.<sup>1</sup>

THIS was a case of an American ship, taken on a voyage from Marblehead to Bilboa, 16th October, 1799, with a cargo of fish, sugar, and cocoa. The ship had been restored. With respect to the cargo it was said, on the part of the captor that it was a case of farther proof; that it appeared, from the deposition of the mate, that the sugar and cocoa had been brought from the Havana to America, and from thence sent on for Spain, from which a suspicion must necessarily arise of Spanish interest; that, if it was even neutral property, a question of law would arise, whether such a trade was not to be considered as a direct trade between the colony of the enemy and the mother country. It was farther said, that the mate had deposed that the master had confessed to him that he had destroyed some papers, which, of itself, would subject the claimant to the necessity of making farther proof.

On the part of the claimant, it was said that the principal part of the lading consisted of salt fish, for the Spanish market, which made it extremely desirable that it should be set at liberty, in order to prosecute the voyage before the beginning of Lent; that it was not in the power of the claimant to take the \* cargo on [ \* 362 ] bail, by submitting to farther proof, as the correspondents of the owner in this country had refused to take the cargo on bail. It was, therefore, pressed that the case might be heard on the original evidence, which was said to be very full and satisfactory, and sufficient to obtain immediate restitution. In respect to the transshipment, it was said to have been of but a small quantity of cocoa; that the sugar was part of a whole cargo, which this vessel had brought on a former voyage from Havana to Marblehead; that as to the suppression of papers, which the mate spoke of, it was doubtful what was the nature of the papers, and that it was the act of a man who was insane, and had since destroyed himself.

COURT. As there has been a spoliation of papers, and as the

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<sup>1</sup> [For cases as to the continuity of a voyage, see note to *The Maria*, 5 C. Rob. 365.]



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The Polly. 2 C. Rob.

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he credits Mr. Hooper with twelve per cent. on the two bills, (on the Havana,) probably for neutralizing this cargo. He credits Hooper, also, for the former cargo by Captain Laskey; so that the whole of this adventure would appear to be at the risk of Gardoqui & Co. It is said, in an affidavit of 17th March, from Mr. Asa Hooper, who is a gentleman speaking from a distant remembrance of the transaction only, and is not himself connected with the business, "that he was informed, at the time this transaction took place, that the duties were paid and the goods landed;" but there is no trace of that in proof, nor in the affidavit of Mr. R. Hooper, the claimant, and his sons, nor does it appear that the goods were entered for the American market. They came from a Spanish colony, and were landed whilst the ship underwent repair, that she might prosecute her farther voyage across the Atlantic to the mother country of the colony. Taking these circumstances all together, this defect of proof, the suppression of papers, and the extraordinary nature of the bills of exchange, there is every reason to believe that this cargo is not the *bonâ fide* property of the claimants in America. But supposing it to be their property, it would still fall under the same principle that has been applied to the trade between the colonies and the mother country. It would be the most nugatory thing in the world to say that that trade, which is not allowed to be carried on direct, should become legalized or allowable by a mere transshipment in America. In the cases of *The Mary, Star*, \*which was a trade of a [ \* 365 ] similar nature between Surinam and Holland, the ship and cargo were both condemned.

[COURT. Is it contended that an American might not purchase articles of this nature, and import them, *bonâ fide*, to America, on his own account, and afterwards export them?]

It was answered — No, that was not contended, but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bonâ fide* importation for the American market.

[COURT. It seems to me that this is the material point, and that it is left so bare that it is almost useless to examine the other facts till that is established; and that it would be better to reserve the whole case till farther information is produced on that subject.]

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The Polly. 2 C. Rob.

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For the claimants, *Laurence*. The court will, perhaps, not think it necessary to make that a preliminary question in the present case, if it considers the nature of this cargo and the circumstances attending it. The principal part of the cargo is fish, to the amount of 1,800 quintals, on which no question respecting the legality of the trade is raised. Of the remaining part, consisting of sugar and cocoa, the sugar is but a small parcel, taken for the purpose [ \* 366 ] of making up the lading; and the cocoa is positively \* certified, under the hand of the collector of the customs at Marblehead, to have been imported into America, and to have been entered at his office August 17, 1799. The same certificate also states the sugars to have been entered at his office in June, 1799; and it is sworn by Mr. Asa Hooper, "That he saw several parcels of them in the warehouse of the claimant, Mr. R. Hooper, and that he understood they had all paid the duties." If the owners have not given full and entire information on that fact, it is hoped the court will not think it unreasonable that slighter evidence may be admitted in respect to these articles, making so small a part of the cargo, than if the whole, or the principal part of the cargo, had been exposed to the same objection. As to the property, one circumstance alone is almost sufficient, namely, that the ship was furnished with a letter of marque against France. It is not probable that the Spanish owner would have chosen such a vehicle for the conveyance of his property, since that circumstance alone would have made the whole liable to condemnation by the law of France.

#### JUDGMENT.

Sir W. Scott. This is the case of an American vessel, taken on a voyage from Marblehead to Spain, with a cargo of a mixed nature, consisting of fish, sugar, and cocoa. The ship has been restored; therefore the only question that I have to consider is, respecting the property of the cargo and the legality of the voyage. On the former hearing it appeared to be a case of farther proof, as the cargo was the produce of a Spanish colony, taken on a voyage to Old Spain; and as the master had withdrawn some of the papers, and [ \* 367 ] had, indeed, \* destroyed himself before his deposition was taken. It would, therefore, be a little extravagant to contend that such a case was not a case of farther proof. I do not, however, impute it to the parties, as any diffidence in their own case, that they had sent for farther proof before the cause came on. They might think that some difficulties would arise, and it was but a measure of prudence to be prepared with farther proof. I am, therefore, not disposed to draw any inference disadvantageous to the claim

from that circumstance. I am now to judge of the sufficiency of the proof brought in, and of the force of the different objections that have been made against it.

In respect to the fish, I do not think that there is any thing that affects that part of the case. It is a commerce in which Americans deal largely for the supply of the southern countries of Europe. The whole suspicion and question rests on the other parts of the cargo, the sugar and the cocoa. Now, in the first place, it appears from Mr. Hooper's attestations, and also from those of his two sons, and of another gentleman of the same name, Mr. Asa Hooper, that this ship had made a voyage to Bilboa before, and had taken payment of her cargo in bills on the Havana. It is objected that this is an extraordinary mode of payment; and so it would be for a person not being in any course of connection with the Havana, because they would be to be disposed of by a discount, or other disadvantageous means. But it appears from Mr. Hooper's attestation, that he had been in the habit of carrying on a commerce with Old Spain, and also with the Havana, therefore it might not be attended with any inconvenience \* to him. Other parts of the cargo [ \* 368 ] were paid for, it is said, by bills drawn on Mr. Gardoqui from the Havana, a mode of payment not very natural; but still, if Mr. Hooper was much in correspondence with this house, (as it appears he was, from the accounts current and the correspondence between them, in respect to other cargoes,) I do not see that it might be more than such a mutual accommodation as might take place in a fair transaction of this sort. Taking him, therefore, to have been a person connected with Mr. Gardoqui, there is nothing so alarming in this mode of payment as if the claimant had been a person not engaged in such habits of trade before; and, on the supposition that Mr. Gardoqui was his correspondent, it is no extravagant thing at all that he should be made his consignee in Europe. This circumstance has been pressed against the truth of the claim; but on the considerations which I have stated, I do not think it weighs materially to its disadvantage, and, considering it as connected with the former evidence, and the attestations of the claimant, I think there is no reason to doubt that the cargo is the property of Mr. Hooper.

Then there remains only the question of law which has been raised, whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy? On which it is said that if an American is not allowed to carry on this trade directly, neither can he be allowed to do it circuitously. An American has, undoubtedly, a right to import the produce of the Spanish colonies for his own use; and after it

is imported *bond fide* into his own country, he would [ \* 369 ] \* be at liberty to carry them on to the general commerce of Europe. Very different would such a case be from the Dutch cases, in which there was an original contract from the beginning, and under a special Dutch license to go from Holland to Surinam, and to return again to Holland with a cargo of colonial produce. It is not my business to say what is universally the test of a *bond fide* importation. It is argued that it would not be sufficient that the duties should be paid, and that the cargo should be landed. If these *criteria* are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid.

If it appears to have been landed and warehoused for a considerable time, it does, I think, raise a forcible presumption on that side; and it throws it on the other party to show how this could be merely insidious and colorable. There is, I think, reason to believe that the sugar was a part and parcel of a cargo said to have been brought from a Spanish colony in this vessel; and if so, the very distribution of the remainder is some proof that they were not bought with an intention only of sending them on. But I have, besides, positive proof in the affidavit of Mr. Asa Hooper, who swears,<sup>1</sup> [ \* 370 ] “that the duties had been \* paid for them.” Then the only difficulty remains as to the cocoa; and it is said by one of the witnesses, and by one only, that it was transhipped from another vessel, and that it had been brought into America only ten days before. But although there is something of a difficulty arising on this small part of the cargo, yet upon the whole, I cannot think it weighty enough to induce me to send the case across the Atlantic for still farther proof as to the facts of this recent importation and transhipment, or of its having been transferred to the present proprietors, or of its having been exported without a previous payment of import duties. If it had composed a larger part of the cargo I might have deemed it reasonable to have had somewhat more of satisfaction on some of these points which do not appear with suffi-

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<sup>1</sup> Affidavit of Asa Hooper, of Marblehead, master of the ship Hope, belonging to Boston, and now lying at Cowes, states “that he had been acquainted with Mr. R. Hooper ever since he was a child; that he knows the brig Polly, and was at Marblehead when she sailed for Bilbao; and that he was informed by Captain Lasky and other persons that the sugar, being part of the cargo, was a part of a much smaller quantity, the whole of which had been imported, landed, and the duties paid at New York by the said R. Hooper, in the general course of trade, &c.”



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The Polly. 2 C. Rob.

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cient certainty to found any legal conclusion against it. It appears by the collector's certificate that it had been entered<sup>1</sup> and imported; and I think that these words are sufficient to answer the fair demands of the court.

\* The *King's Advocate* prayed that the captors might be [ \* 371 ] allowed their expenses.

*Laurence* objected that the captors had materially deteriorated the cargo by persisting to unliver the cargo, although they were told that it was unnecessary, and that the farther proof was arrived; that the cargo belonged to the same owner as the ship, and that it might stay on board the ship as a warehouse; that the commission of unlivery was a matter of form on ordering of farther proof, but not necessary to be carried into execution in such a case as this; that the claimants, instead of being made subject to the expenses, ought to be indemnified for the deterioration which the cargo had sustained.

COURT.— Did you object to the commission?

*Answered.* That it passed in the usual course before a surrogate.

The *King's Advocate* replied that if it had been omitted the captors would have been liable to demurrage; that the captors had been guilty of no misconduct; that the commission passed in the ordinary form without opposition; and that so soon as the objection was made, on the part of the claimants, the captors desisted from the unlivery; that it was so far from being absolutely unnecessary in the present case, that two lighters of rotten fish had been taken out, which had spoiled on board.

\* COURT. I see nothing to affect the captors with miscon- [ \* 372 ] duct. When the ship was brought in, the claimant refused to accept the restitution of the ship without the cargo, contending that

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<sup>1</sup> The certificate of the collector stated that in June the *Polly* entered at his office, with a cargo of 590 boxes of sugars, the property of American citizens; that 17th August, the schooner *William* entered with 67 hogsheads, &c., of cocoa, and certified the clearing out of the *Polly*, &c., for *Bilboa*, with a cargo of 249 boxes of brown sugars, imported in the said brig from the *Havana*, on the 25th June; and of 30 hogsheads, &c., of cocoa, imported in the schooner *William*, from *Laguaira*, with 1800 quintals of fish. Be it known, &c., that this cargo of sugars, cocoa, and fish, cleared out from this port for *Bilboa*, 27th August, 1799, is the property of citizens of America, &c.

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La Rosine. 2 C. Rob.

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it was not a case of farther proof. The court determined that it was; and it does not appear that any communication was made, after the order for the captors, to restrain them from proceeding to unlivery. The commission of unlivery passed as of course, and they proceeded in the execution of it till intimation was given on the part of the claimant, and on the first intimation the captors stopped their hand. I can impute no blame to the captors; and I shall give them what I was disposed to give them before the objection was taken, the expenses of farther proof.

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LA ROSINE, or the King against — Boxes of Tin.

February 11, 1800.

Tin plates for canister shot, put on board a cartel ship by a British manufacturer at Dover condemned as droit of admiralty.

THIS was a case of several boxes of tin plates, said to be such as are used for canistering shot, seized by order of the officers of the Fife dragoons at Dover, on information that they had been put on a French cartel ship, by a brazier of that place. The ship had been detained, but was immediately released by an order from the Duke of Portland. On application to condemn these tin plates as droits of admiralty :

COURT. There must be some witness who can prove the [ \* 373 ] putting on board. It is a very serious thing to stop a cartel ship, or confiscate any thing that is on board. If they had such articles on board, without any intention of landing them, there could be no reason for stopping them. The fact of shipping them in England, is the material circumstance to be proved. The deposition of the witness, who is a sergeant of the Fife dragoons, states, "that between eleven and twelve, on the night of the 13th September, he saw sundry persons, the crew of the cartel ship, carrying boxes from the brazier's, and putting them on board the ship, which was lying near the quay, with her sails set, and ready to sail; that he broke open one of the boxes, and finding it contained tin in sheets, he immediately detained the ship, and placed sentinels on board, and went and informed his officer; that on returning he found the mayor; and that some of the officers of the customs had got on board, and had taken possession of the goods on board, and

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Orders of Court. 2 C. Rob.

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landed them, &c.” This is rather too loose. He does not say the goods in question, but the goods on board. It might apply to any other goods. But I perceive there is an affidavit, of the same person, which is more precise. It states, “that they searched the said boxes, and found they contained each from one to two hundred sheets of tin, &c.; and that in consequence thereof, the said boxes, sixty-nine in number, were immediately taken from on board the said ship, and carried to the custom-house.” On this evidence I shall condemn these boxes of tin as droits of admiralty.

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• ORDERS OF COURT.

[ • 374 ]

January 28, 1801.

THAT no warrant of arrest, either of persons or ships, shall issue out of the Instance Court, without an affidavit of debt being previously made by the person on whose behalf such warrant is prayed, or his lawful attorney.

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March 13, 1801.

THAT the cases of all ships detained in the ports, in which claims have been given, shall be brought before the court on the two last sittings in each month, which two last sittings shall exclusively be appropriated to such cases, if they are numerous enough to occupy it entirely.

Such detained ships, for which claims have been given, as are not brought by the captors before the court on the said two last sittings, in each month in which they shall have been brought in, shall, if they are restored at any later sittings upon the original proof, be entitled to demurrage, to be computed from the time at which they ought to have been brought before the court, in pursuance of the former part of this order.

## ADDITIONAL NOTE

*To the War Onskan, (p. 300) ; comprising a Summary Review of French Proceedings in Matters of Prize, during the Present War.*

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IN pointing the attention of the reader to the series of facts, which have justified the change of practice, rather than of principle, that has taken place in our Court of Admiralty during the present war, in respect to the allowance of salvage on recapture of neutral property out of the hands of French cruisers, the editor is happy to be able to abstain from any other observations, on the proceedings of the cruisers and the courts of France, than those which are supplied by French writers, and those writers of authority on this subject.

After describing the acts of violence and outrage against the American flag, (which is still farther evidenced by the acts of hostility which have ensued,) the author of *Le dix huit Brumaire*,<sup>1</sup> published at Paris, 1800, reproaches the proceedings of his countrymen in these terms:—"Le pavillon Danois essuya mille avanies; mais ce qu'il y a de remarquable c'est que, malgré le grand intérêt, que nous avions à ménager sa Majesté Prussienne, son pavillon ne fut pas plus respecté, que les autres; si elle eût voulu chercher un prétexte pour rompre avec nous, les corsaires Français lui en eussent offert mille, &c. On ne se contenta pas de traiter de la sorte des puissances neutres; l'on en agit encore avec plus de rapacité à l'égard de la République Batave, notre alliée, notre amie;"—notwithstanding the services, described at length:—"Il falliot encore, que les corsaires Français leur enlevassent jusque dans leur eaux, jusque sous le canon de leur places, le peu de petits bâtimens, qu'ils osoient [\* 376] \* mettre à flots,—envoyoient ils des secours en blé dans leur colonies pour les substanter, et empecher par la qu'elles ne se livrassent à l'Angleterre faute de vivres, des armateurs Français interceptoient ces convois, et les faisoient declarer de bonne prise, à la faveur des loix vexatoires rendues en cette matière, et dont l'application etoit souvent prononcée, dans certain tribunaux de départemens, par des juges, que avoient un intérêt dans les armemens en course." pp. 168, 170.

If such were the proceedings of the French cruisers and French courts of justice, it will be found that the frequent change, or rather confusion, which has taken place in France, with respect to the prize jurisdiction during the present war, has been but ill adapted to correct the abuse. One of the first acts of the revolution was to dissolve all possible connection between the executive power of the state and the administra-

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<sup>1</sup> Vol. i. p. 286.

tion of justice; and no distinction was made between the ordinary administration of laws between citizen and citizen, and the administration of a branch of law which is, in some respects, *sui generis*; the public law of prize, administered to foreign states in time of war, on the authority of general principles of equity, the immemorial usage and customs of the sea, and the express treaties subsisting with particular countries.

The first article of the law of 13th August, 1791, had given to the Tribunals of Commerce a general civil jurisdiction over all questions of commerce, reserving, or, as it is expressed, "without including, for the present, the jurisdiction over prize matters." Code des Prises, 1799, vol. 2, p. 125. Notwithstanding this reservation, many prize cases were carried before those tribunals, immediately on the issuing of reprisals on the part of France, 31st January, 1793; although it was not till the 14th February that a provisional decree passed, giving them authority in prize matters. Ibid. On the 21st February another decree passed, justifying every thing that had been done by those tribunals on the subject of prize, previous to the 14th February; and declaring them "to be rightly seized of the prize jurisdiction, and authorized to judge definitively on such cases." Ibid. On the 1st of October, 1793, a farther modification took place; and the jurisdiction was given, "aux juges de paix pour l'instruction, (taking examination, &c.,) et aux tribunaux de commerce pour le jugement." On the 8th November, 1793, a still more important change was made; the decree \* of the 14th February was expressly repealed, and a [\* 377] jurisdiction over all prize causes was established, to be exercised "par voie d'administration, par le conseil exécutif provisoire." Ibid. p. 125.

The editor of the new Code des Prises observes on that decree, that it was, in one respect, most absurd; as it repealed the regulation of the 14th February, which was only provisional, and left unnoticed the law of the 1st of October, which was definitive, to the same effect; and he adds, "quoiqu'il en soit de cette confusion, ou de cette contradiction des lois, celle du premier Octobre, 1793, est restée dans toute sa force, malgré cet étrange décret postérieur du 8 Novembre, 1793, et nous la rapporterons toute entière à sa date, comme formant encore actuellement la loi principale sur la compétence des Prises." Ibid. p. 126.

However, the power which was given to the executive council, by this decree, continued to be exercised, on the suppression of that board, by the Committee of Public Safety, till the law of 3 Brumaire, an 4, (24th October, 1795,) confirmed by the law of 8th Floréal, (27th April, 1796,) gave the jurisdiction of prize again to the ordinary tribunals. Code des Prises, v. 2, p. 382. The jurisdiction, as it was at that time established, may be thus described:—The courts of first resort were, the Tribunals of Commerce, or the Courts of the Consul, or Vice-Consul, in foreign parts, as equivalent to the Tribunals of Commerce; from these courts there lay an appeal to the Tribunals of the Departments. Code des Prises, v. 2, p. 254. And in all cases there was a power of appeal to the Court of Cassation, on points of form or of mere law.

With respect to the proceedings under this changeable system, we must believe, on the word of the editor of the new Code des Prises, (who was also an official person in the Court of Cassation,) that, during the time of the Convention, there was no stability or consistency to be found in them; and he dates the commencement of a better order of things only from the commencement of the Constitution of the third year, (1795.) "A compter de ce moment seulement, on voit enfin paraître dans cette partie, des lois stables, et à peu-près complètes. Tout jusqu' alors, s'était ressenti de la tourmente révolutionnaire." We find, however, so late as 22d Nivose, an 7, (11th January, 1799,) that the Executive Directory \* were by no means satisfied with [\* 378] the state of the prize jurisdiction, but were projecting other changes. After a clear and detailed account of the true interests, and, it may be added, the only one

real principle of France, in the management of prize matters, all summed up in this short and instructive sentence : — “ A mieux apprécier les droits des nations neutres, et à sentir que tout ce qui serait fait pour elles, serait un coup porté à l'Angleterre.” They conclude their memorial to the Council of Five Hundred with these words : — “ Le Directoire Exécutif regarde donc qu'il est de son devoir de vous inviter spécialement à revoir la législation de prises, et à décider au préalable, come base essentielle, que dès ce moment, les contestations sur le fait de la validité des prises, seront en dernière analyse, terminées administrativement.” Code des Prises, v. 2, p. 379, 390.

The note which the editor of the Code des Prises subjoins to some of the representations of abuse contained in this memorial, is too instructive to be omitted. “ Voilà justement ce qui fait, que dans les contestations actuelles sur les prises, chacun applique a tort, et a travers à sa cause, les anciens réglemens, sans s'inquiéter de ceux abrogés, ou de fait, ou de tacitement, par les réglemens postérieurs ; l'armateur, et le capturé prennent réciproquement dans chaque règlement ce qu'ils croient leur être utile, et laissent à l'écart ce qui peut leur être contraire. Les Juges eux-mêmes ne savent le plus souvent, a quoi s'en tenir.”

It is certain that the Executive Directory did not succeed in their attempt to introduce a farther change ; and it is to their failure that the publication before mentioned, Le dix huit Brumaire, refers, it is apprehended, in these words : — “ En vain plusieurs membres du directoire voulurent ils eux mêmes faire changer la législation sur les neutres ; tout fut inutile ; Le corps législatif alloit son train. Beaucoup de députés en participant à l'émission de semblables décrets, ignorant la manière dont se saisoit la course, croyoient fair du bien à la République, et ne tuer que le commerce Anglais. Enfin parmi ces Deputes, (et ceux-ci c'étoient les meneurs, c'étoient ceux que propoisoient les loix,) il y en avoit que étoient corsaires eux-mêmes, que avoient des bâtimens en mer, ou qui avoient des intérêts sur les corsaires. On sent si ces hommes intéressés aux captures se souceoient beaucoup de ménager les puissances [\* 379] neutres ou alliées ! Ajoutons à cela comme nous l'avons \* déjà fait pressentir plus haut, qu'il y avoit dans certains Tribunaux qui jugeoient de la validité des prises, des juges qui avoient eux-mêmes des intérêts sur les corsaires, et par consequent sur la cargaison, dont ils prononcoient le relâchement, ou la confiscation.” pp. 171, 172.

This is the short history of the general effect of the French proceedings in matters of prize, extracted from their own writers, and presenting no inadequate cause for all those acts of violence and shameless rapacity, under which the different nations of Europe have notoriously suffered during the present war. It would have been encroaching too much on the reader's patience to have described each separate act of violence in its proper character. Such was the state of their proceedings till the late change, which has taken place under the present government ; by which the prize jurisdiction is again exercised par voie d'Administratur, as it is called, or by means of a particular court, or Conseil des Prises, established by the Consuls, 6 Germ. 8 year, 26th March, 1800 ; in virtue of the law of 26 Ventose, 16th March, preceding. The effect of these establishments is yet untried ; except that, as to America, they have been again suspended.

It would be improper to close this short account of the French proceedings without noticing one very remarkable and pregnant passage in the address of the Executive Directory before alluded to. It contains these memorable words : — “ Et quand il est malheureusement trop vrai, qu'il n'y a pas un seul vaisseau marchand naviguant sous pavillon Français, quel autre moyen d'exportation avons nous, que l'emploi des vaisseaux neutres ? ”<sup>1</sup> And the note to that passage adds, “ Dans la dernier état publié

<sup>1</sup> Code des Prises, vol. ii. p. 385.

par les gazettes du Nord, du nombre des vaisseaux qui ont passé le Sund, depuis un an, ou ne trouve pas un seul navire Français." From the acknowledgment of this state of facts, one of these two conclusions must follow; either that the French marine is entirely annihilated or suspended, or that a considerable part of French commerce (if it still survives,) is conducted under the cover and mask of neutral flags. Taking the just measure of the right of visitation and search, (against which so many objections have lately been made,) at a mean ratio, between the importance of the result to be obtained by the belligerent over the commerce of his enemy, and a reasonable attention \* to the preëxisting state of neutral commerce, and [ \* 380 ] the convenience of carrying on that commerce, in a legitimate, *bonâ fide*, ingenuous manner, what representation of facts can, in so few words, vindicate the necessary existence of a right of search? (without which, all pretensions over the property of the enemy would be nugatory and merely verbal,) vindicating this right of visitation on one side, on the ground of its effect in annihilating the commerce of the enemy; or, on the other, on the ground of just and necessary control over the interposition of neutral names, to protect the trade of the enemy, — if, in fact, French trade does exist in any considerable degree, without the appearance of one French merchantman to carry it on.

## APPENDIX.

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### No. I.

**ADDITIONAL INSTRUCTION** *to the commanders of all our ships of war, and privateers, that have or may have letters of marque against France. Given at our Court at Saint James's, the sixth day of November, 1793, in the thirty-fourth year of our reign.*<sup>1</sup>

**GEORGE R.**  
(L. S.)

THAT they shall stop and detain all ships laden with goods, the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and shall bring the same, with their cargoes, to legal adjudication in our Courts of Admiralty.

By his Majesty's command,

HENRY DUNDAS.

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### No. II.

**INSTRUCTIONS** *to the commanders of our ships of war, and privateers, that have or may have letters of marque against France. Given at our Court at St. James's, the eight day of January, 1794, in the thirty-fourth year of our reign.*<sup>2</sup>

**GEORGE R.**  
(L. S.)

WHEREAS, by our former instruction to the commanders of our ships of war, and of privateers, dated the sixth day of November, 1793, we signified that they should stop and detain all ships laden with goods, the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and should bring the same, with their cargoes, to legal adjudication; we are pleased to revoke the said instruction, and in lieu thereof, we have thought fit to issue these our instructions to be duly observed by the

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<sup>1</sup> *Vide supra*, p. 151, &c.

<sup>2</sup> *Vide supra*, p. 151.



commanders of all our ships of war, and privateers, that they have or may have letters of marque against France.

1st. That they shall bring in for lawful adjudication all vessels, with their cargoes, that are laden with goods, the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe.

2d. That they shall bring into lawful adjudication all ships, with their cargoes, that are laden with goods, the produce of the said islands, the property of which goods shall belong to subjects of France, to whatsoever ports the same may be bound.

3d. That they shall seize all ships that shall be found attempting to enter any port of the said islands that is or shall be blockaded by the arms of his Majesty or his allies, and shall send them in, with their cargoes, for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of June, 1793.

4th. That they shall seize all vessels laden wholly or in part with naval or military stores, bound to any port of the said islands, and shall send them into some convenient port belonging to his Majesty, in order that they, together with their cargoes, may be proceeded against according to the rules of the law of nations.

By his Majesty's command,

HENRY DUNDAS.

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No. III.

INSTRUCTIONS *for the commanders of our ships of war, and privateers, who have or may have letters of marque against France, Spain, GEORGE R. or the United Provinces. Given at our Court at St. (L. s.) James's, the twenty-fifth day of January, 1798, in the thirty-eight year of our reign.*<sup>1</sup>

WHEREAS, by our former instructions to the commanders of our ships of war and privateers, dated the 8th of January, 1794, we signified that they should bring in for lawful adjudication, all vessels with their cargoes that were laden with goods, the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe; and likewise all ships, with their cargoes, that were laden with goods, the

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<sup>1</sup> *Vide supra*, p. 151.

produce of the said islands, the property of which goods should belong to subjects of France, to whatsoever ports the same might be bound ; and that they should seize all ships that should be found attempting to enter any port of the said islands that was or should be blockaded by the arms of his Majesty or his allies, and should send them in, with their cargoes, for adjudication ; and also all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands, and should send them into some convenient port belonging to his Majesty, in order that they, together with their cargoes, might be proceeded against according to the law of nations. And whereas, in consideration of the present state of the commerce of this country, as well as that of neutral countries, it is expedient to revoke the said instructions ; we are pleased hereby to revoke the same, and in lieu thereof, we have thought fit to issue these our instructions, to be observed from henceforth by the commanders of all our ships of war, and privateers, that have or may have letters of marque against France, Spain, and the United Provinces.

I. That they shall bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods, the produce of any island or settlement belonging to France, Spain, or the United Provinces, and coming directly from any port of the said islands or settlements, to any port in Europe, not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong.

II. That they shall bring in, for lawful adjudication, all ships, with their cargoes, that are laden with goods, the produce of the said islands or settlements, the property of which goods shall belong to subjects of France, Spain, or the United Provinces, to whatsoever ports the same may be bound.

III. That they shall seize all ships that shall be found attempting to enter any port of the said islands or settlements, that is or shall be blockaded by the arms of his Majesty ; and shall send them in with their cargoes, for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of June, 1793.

IV. That they shall seize all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands or settlements, and shall send them into some convenient port belonging to his Majesty, in order that they, together with their cargoes, may be proceeded against according to the rules of the law of nations.

By his Majesty's command,

PORTLAND.

## No. IV.

## ADMIRALTY PRIZE COURT.

FORTUNA, Jacob Christian Jebsen, master.<sup>1</sup>

THE claim of Jacob Christian Jebsen, of Apenrade, in Denmark, a subject of his Majesty the King of Denmark, and master of the ship Fortuna, on behalf of himself and of Ambrocus Henricus Lange, and others, all of Apenrade aforesaid, also subjects of his Majesty the King of Denmark, the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture, now detained at Leith, in North Britain, in consequence of the seizure or detention of the cargo of the said ship by the collector and comptroller of his Majesty's customs at Leith aforesaid, as set forth in the affidavit hereto annexed; and also on behalf of Peter Peschier, of Copenhagen, merchant, likewise a subject of his Majesty the King of Denmark, the true, lawful, and sole owner and proprietor of the said cargo, for the said ship, her tackle, apparel, and furniture, as the sole property of Danish subjects as aforesaid, and for the cargo of the said ship, also as Danish property subject to a proportion<sup>2</sup> of a certain average due from the said ship and cargo, arising from damage sustained by the ship, in consequence whereof, he was forced to put into Leith as aforesaid; and for such proportion of the said average accordingly, and for all such freight, losses, costs, charges, damages, demurrage, and expenses as have arisen, or shall or may arise by reason of the seizure or detention aforesaid.

J. NICHOLL.

JACOB CHRISTIAN JEBSEN.

<sup>1</sup> 9th May, 1795. *Vide supra*, p. 170 & 176.

<sup>2</sup> This form of claim and affidavit was inserted to answer the note, page 170. Being the claim in the Fortuna, Jebsen, cited page 176. It may, at the same time, serve to state more precisely the particulars of that case. The general average incurred was 335*l.* 14*s.* 6*d.* The proportion, as settled between the parties, on the cargo, was 241*l.* 16*s.* 4*d.* There was, besides, a charge for particular average on the cargo of 24*l.* 15*s.* 8*d.*, amounting altogether to 265*l.* 16*s.* 4*d.* After a deduction of 240*l.* for wheat thrown overboard and brought into the general average, there remained a balance of 25*l.* 16*s.* 4*d.* to be paid by the cargo.

It was this sum that was deducted by the registrar and merchants, from the estimate of the remaining cargo taken by government in abatement of the price to be paid to Mr. Peschier.

## No. V.

## ADMIRALTY PRIZE COURT.

THE FORTUNA, Jacob Christian Jebesen, master.<sup>1</sup>

APPEARED, personally, Jacob Christian Jebesen, of Apenrade, in Denmark, and made oath, that he is a subject of his Majesty the King of Denmark, and master of the ship Fortuna, and that the deponent and Ambrosius Henricus Lange, and others, all of Apenrade aforesaid, and likewise subjects of his Majesty the King of Denmark, were, and are the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture; and he further saith, that having taken in a cargo of wheat, (the property, as he the deponent verily believes, of Peter Peschier, of Copenhagen, merchant, also a subject of his Majesty the King of Denmark,) he sailed therewith early in November last, from Copenhagen aforesaid, bound to Bordeaux, but that the vessel meeting with much bad weather and contrary winds, and having sprung a leak; he the deponent, was forced to make for a harbor, and accordingly put into the port of Leith, in North Britain, where the said cargo was unladen in order to enable the deponent to repair the damage sustained by the ship; that the said ship was accordingly repaired, and the said cargo having been stored in warehouses at Leith under the locks of the collector and comptroller of the customs there, this deponent, on the 2d of March last, applied to the said collector and comptroller for permission to reship the same, but that such permission was refused; and that the said cargo hath been ever since detained and is now seized and detained in the said warehouse at Leith, under the authority of the said collector and comptroller; and that in consequence of such seizure or detention of the cargo, the said ship is also now lying at Leith unable to prosecute her aforesaid voyage; and, referring to the papers hereto annexed, marked from No. 1 to No. 8, inclusive, he saith that the same are the documents relating to the ship and cargo, and were on board at the time of his putting into Leith as aforesaid, and that the same are true and genuine; and he further saith, that no person or persons being a subject or subjects of France, or inhabiting within any of the territories of France, nor their factors or agents, nor any other enemies of the crown of Great Britain, had, at the time of the said seizure or detention, or now have any right, title, or interest in the said ship, her tackle, apparel, furniture, or, to the knowledge or belief of this deponent, in the cargo of the said ship, or in any part thereof; and that the claim hereto annexed is a true and just claim, and that he shall be able to make due proof thereof, as he, the deponent, verily believes.

JACOB CHRISTIAN JEBSEN.

Same day sworn before me, J. FISHER, Surr.

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<sup>1</sup> 9th May, 1795. *Supra*, p. 170.

## No. VI.

*At the Council Chamber, Whitehall, the 20th of December, 1799; present the Lords of his Majesty's most Honorable Privy Council.<sup>1</sup>*

WHEREAS, by an act of parliament passed in the thirty-ninth year of his Majesty's reign, intituled "An act to allow the importation of Spanish wool in ships belonging to countries in amity with his Majesty," it is enacted among other things, that in case any ship or vessel having on board any Spanish wool, has been, or may be detained, and it shall appear to the satisfaction of the Lords of his Majesty's Council that his Majesty's license was granted for the importation of such Spanish wool before such detention, it shall be lawful for the said Lords of his Majesty's Council, and they are hereby authorized and required to order and direct the immediate restoration of all such Spanish wool, under the aforesaid circumstances, to the respective owner or owners, or proprietor or proprietors thereof. And, whereas, his Majesty, by license under his royal sign manual, bearing date the 24th day of May, 1799, did authorize Messrs. Roberts & Co., of London, merchants, or their agents, or the bearer of their bills of lading, to import on board any neutral vessels from Bilboa to any port in Great Britain, the quantity of Spanish wool and other articles specified in the bills of lading. And, whereas, it has been represented that the said Messrs. Roberts & Co. did, in pursuance of such license, cause to be put on board the ship *Die Beurse*, Thomas Shimells, master, being a neutral vessel, the following Spanish wool, viz.

128 bags of Spanish wool,

12 ditto, ditto,

for the purpose of importing the same into this kingdom under the authority of such license. And, whereas, it has also been represented that the said ship or vessel was seized by *The Telegraph*, man-of-war; and it is alleged that the sole ground of such seizure and detention is, that such ship, or vessel, had on board such Spanish wool as aforesaid. Now, under the powers and authorities vested in the Lords of his Majesty's Council by the said act, it is declared, that it has been made to appear to them that his Majesty's license was granted for the importation of such Spanish wool, as aforesaid; and it is ordered in council, in further pursuance of the said act, that the said vessel, and all such Spanish wool, as aforesaid, be forthwith liberated, as far as the same would have been liable to seizure and detention in respect to the Spanish wool on board the same, in case such wool had been put on board such vessel without such license having been granted, as aforesaid; and the Judge of his Majesty's High Court of Admiralty is to give the necessary directions herein accordingly.

W. FAWKENER.

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<sup>1</sup> *Vide supra*, p. 171.

## No. VII.

*At the Court at St. James's, the 19th of February, 1800; present, the King's most excellent Majesty in Council.*<sup>1</sup>

WHEREAS, by an act passed in the thirty-ninth year of his Majesty's reign, intituled "an act to allow the importation of Spanish wool in ships belonging to countries in amity with his Majesty," reciting that, by an act passed in the thirty-third year of his Majesty's reign, to prevent traitorous correspondence with his Majesty's enemies, and by several subsequent acts, trade and intercourse was prohibited between Great Britain and the countries in hostility with his Majesty, unless such trade and intercourse should be specially permitted by his Majesty's license and authority; and also reciting, that, for the encouragement of the manufactures of this country, it was expedient to permit the importation of Spanish wool from any place whatever in ships or vessels belonging to any kingdom or state in amity with his Majesty, it was enacted that it should be lawful to and for any person or persons to import into this kingdom Spanish wool from any port or place whatever, in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with his Majesty, any thing in the said act passed in the thirty-third year of the reign of his present Majesty, or any other act or acts of parliament to the contrary in anywise notwithstanding.

And, whereas, doubts have arisen, whether, according to the true construction of the said act of the thirty-ninth year of his Majesty's reign, his Majesty's subjects are thereby authorized to purchase and import Spanish wool under circumstances which would make the same liable to capture, as the property of subjects of his Majesty trading with the enemy, unless the license of his Majesty should be first obtained for that purpose. His Majesty, by and with the advice of his Privy Council, is pleased to order, and it is hereby ordered, that it shall be lawful for any of his Majesty's subjects to purchase and import into this kingdom any Spanish wool, in any ship or vessel belonging to any kingdom or state in amity with his Majesty, notwithstanding the purchase and importation thereof may be deemed a trading with his Majesty's enemies, and notwithstanding the same might be liable to capture as the property of his Majesty's subjects, trading with the enemy, in case this order had not been made.

And, whereas, some of his Majesty's subjects may have already purchased for the purpose of importing into this kingdom, and others may have caused to be brought to this kingdom, for the purpose of importation, Spanish wool, without have obtained his Majesty's special license for the same, conceiving that such license had been rendered unnecessary by the said act of the thirty-ninth year of his Majesty's reign, his Majesty is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that in case any person

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<sup>1</sup> Vide *supra*, p. 171.

or persons, being a subject or subjects of his Majesty, hath, or have, since the passing of the said act, purchased, for the purpose of importing into this kingdom, or caused to be brought into this kingdom for the purpose of importation, any such Spanish wool as aforesaid, without having previously obtained any special license from his Majesty for so doing; it shall be lawful for such person or persons to import the same, as if such license had been previously obtained. And this, his Majesty's order, shall be deemed and taken to be a full and sufficient license for the purchase, and importation of such wool, notwithstanding such purchase or importation might otherwise be deemed unlawful, as a trading with his Majesty's enemies, in case this order had not been made. And the Right Honorable the Lords Commissioners of his Majesty's Treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein, as to them may respectively appertain.

W. FAWKENER.

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No. VIII.

INSTRUCTIONS *for the commanders of such merchant ships or vessels who shall have letters of marque and reprisals for private men-of-war against the ships, vessels, and goods belonging to the persons inhabiting the coasts and ports of Genoa, and the territories of the*  
 GEORGE R. *Pope, styling themselves the Ligurian and the Roman Republics, by virtue of our commission granted under our*  
 (L. S.) *great seal of Great Britain, bearing date the twenty-eighth day of September, 1798. Given at our court at St. James's, the twenty-ninth day of September, 1798, and in the thirty-eighth year of our reign.*

ARTICLE I.

THAT it shall be lawful for the commanders of ships authorized by letters of marque and reprisal for private men-of-war, to set upon by force of arms, and subdue and take the men-of-war, ships and vessels, goods, wares, and merchandises belonging to persons inhabiting the coasts and ports of Genoa, and the territories of the Pope, styling themselves the Ligurian and the Roman republics; but so as that no hostility be committed, nor prize attacked, seized, or taken, within the harbors of princes and states in amity with us, or in their rivers or roads, within the shot of their cannon, unless by permission of such princes or states, or of their commanders or governors-in-chief in such places.

II. That the commanders of ships and vessels so authorized as aforesaid, shall bring all ships, vessels, and goods, which they shall seize and take, into

such port of this, our realm of England, or some other port of our dominions, as shall be most convenient, in order to have the same legally adjudged in our High Court of Admiralty of England, or before the judges of any other Admiralty Court lawfully authorized within our dominions.

III. That after such ships, vessels, and goods, shall be taken and brought into any port, the taker, or one of his chief officers, or some other person present at the capture, shall be obliged to bring or send, as soon as possibly may be, three or four of the principal of the company (whereof the master, supercargo, mate, or boatswain to be always two) of every ship or vessel so brought into port, before the judge of our High Court of Admiralty of England, or his surrogate, or before the judge of such other Admiralty Court, within our dominions, lawfully authorized as aforesaid, or such as shall be lawfully commissioned in that behalf, to be sworn and examined upon such interrogatories as shall tend to the discovery of the truth concerning the interest or property of such ship or ships, vessel or vessels, and of the goods, merchandises, or other effects found therein; and the taker shall be farther obliged, at the time he produceth the company to be examined, and before any monition shall be issued, to bring and deliver into the hands of the judge of the High Court of Admiralty of England, his surrogate, or the judge of such other Admiralty Court within our dominions lawfully authorized, or others commissioned as aforesaid, all such papers, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings, as shall be delivered up, or found on board any ship. The taker, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up, or otherwise found on board, being first numbered and their number specified in the affidavit at the time of the capture, making oath that the said papers and writings are brought and delivered in as they were received and taken, without any fraud, addition, subduction, or embezzlement, or otherwise to account for the same upon oath, to the satisfaction of the court.

IV. That the ships, vessels, goods, wares, merchandises, and effects, taken by virtue of letters of marque and reprisals as aforesaid, shall be kept and preserved, and no part of them shall be sold, spoiled, wasted or diminished; and that bulk thereof shall not be broken before judgment be given in the High Court of Admiralty of England, or some other Court of Admiralty lawfully authorized in that behalf, that the ships, goods, and merchandises, are lawful prize.

V. That if any ship or vessel belonging to us, or our subjects, shall be found in distress, by being in fight, set upon, or taken by the enemy, or by reason of any other accident, the commanders, officers, and company of such merchant ships or vessels as shall have letters of marque and reprisals as aforesaid, shall use their best endeavors, and give aid and succor to all such ship and ships, and shall, to the utmost of their power, labor to free the same from the enemy, or any other distress.



VI. That the commanders or owners of such ships and vessels, before the taking out letters of marque and reprisals, shall make application in writing, subscribed with their hands, to our high admiral of Great Britain, or our commissioners for executing that office for the time being, or the lieutenant or judge of the said High Court of Admiralty, or his surrogate, and shall therein set forth a particular, true, and exact description of the ship or vessel for which such letters of marque and reprisals is requested, specifying the burthen of such ship or vessel, and the number and nature of the guns, and what other warlike furniture and ammunition are on board the same, to what place the ship belongs, and the name or names of the principal owner or owners of such ship and vessel, and the number of men intended to be put on board the same, and for what time they are victualled, also the names of the commander and officers.

VII. That the commanders of ships and vessels having letters of marque and reprisals as aforesaid, shall hold and keep, and are hereby enjoined to hold and keep a correspondence, by all conveniences and upon all occasions, with our high admiral of Great Britain, or our commissioners for executing that office for the time being, or their secretary; so as from time to time to render and give him or them not only an account or intelligence of their captures and proceedings by virtue of such commissions, but also of whatever else shall occur unto them, or be discovered and declared to them, or found out by them, or by examination of, or conference with, any mariners or passengers or of or in the ships or vessels taken, or by any other ways and means whatsoever, touching or concerning the designs of the enemy, or any of their fleets, ships, vessels, or parties; and of the stations, seaports, and places, and of their intents therein; and of what ships or vessels of the enemy bound out or home, or where cruising, as they shall hear of; and of whatever else material in these cases may arrive at their knowledge; to the end such course may be thereupon taken and such orders given, as may be requisite.

VIII. That no commander of any ship or vessel having a letter of marque and reprisal as aforesaid, shall presume, as they will answer at their peril, to wear any jack, pennant, or other ensign, or colors usually borne by our ships; but that, besides the colors usually borne by merchants ships, they do wear a red jack, with the union jack described in the canton at the upper corner thereof, near the staff.

IX. That no commander of any ship or vessel having a letter of marque and reprisals as aforesaid, shall ransom or agree to ransom, or quit or set at liberty, any ship or vessel, or their cargoes, which shall be seized and taken.

X. That all captains or commanding officers of ships having letters of marque and reprisals, do send an account of, and deliver over, what prisoners shall be taken on board any prizes, to the commissioners appointed, or to be appointed, for the exchange of prisoners of war, or the persons appointed in

the seaport towns to take charge of prisoners ; and that such prisoners be subject only to the orders, regulations, and directions of the said commissioners ; and that no commander, or other officer of any ship having a letter of marque and reprisal as aforesaid, do presume, upon any pretence whatsoever, to ransom any prisoners.

XI. That in case the commander of any ship having a letter of marque and reprisal as aforesaid, shall act contrary to these instructions, or any such further instructions, of which he shall have due notice, he shall forfeit his commission to all intents and purposes, and shall, together with his bail, be proceeded against according to law, and be condemned in costs and damages.

XII. That all commanders of ships and vessels having letters of marque and reprisals shall, by every opportunity, send exact copies of their journals to the secretary of the admiralty, and proceed to the condemnation of their prizes as soon as may be, and without delay.

XIII. That commanders of ships and vessels having letters of marque and reprisals, shall upon due notice being given to them, observe all such other instructions and orders, as we shall think fit to direct from time to time, for the better carrying on this service.

XIV. That all persons who shall violate these, or any other of our instructions, shall be severely punished, and also required to make full reparation to persons injured contrary to our instructions, for all damages they shall sustain by any capture, embezzlement, demurrage, or otherwise.

XV. That before any letter of marque or reprisals for the purposes aforesaid, shall issue under seal, bail shall be given with sureties, before the lieutenant and judge of our High Court of Admiralty of England, or his surrogate, in the sum of three thousand pounds sterling, if the ship carries above one hundred and fifty men ; and if a less number, in the sum of fifteen hundred pounds sterling, which bail shall be to the effect and in the form following :

“ WHICH day, time, and place, personally appeared

and

who submitting themselves to the jurisdiction of the High Court of Admiralty of England, obliged themselves, their heirs, executors, and administrators, unto our sovereign lord the king, in the sum of

pounds of lawful money of Great Britain, to this effect, that is to say, that whereas

is duly authorized by letters of marque and reprisals, with the ship called the of the burthen of about

tons, whereof he, the said

goeth master, by force of arms to attack, surprise,

seize, and take all ships and vessels, goods, wares, and merchandises, chattels, and effects, belonging to the persons inhabiting the coasts and ports of Genoa, and the territories of the Pope, styling themselves the Ligurian and Roman republics, excepting only within the harbors or roads within shot of cannon of princes and states in amity with his Majesty. And whereas the said

hath a copy of certain instructions, approved of and passed by his Majesty in council, as by the tenor of the said letters of marque and reprisals, and instructions thereto relating, more at large appeareth. If, therefore, nothing be done by the said

or any of his officers, mariners, or company, contrary to the true meaning of the said instructions, and of all other instructions which may be issued in like manner hereafter, and whereof due notice shall be given him, but that the letters of marque and reprisals aforesaid, and the said instructions, shall in all particulars be well and duly observed and performed, as far as they shall the said ship, master, and company any way concern; and if they shall give full satisfaction for any damage or injury which shall be done by them, or any of them to any of his Majesty's subjects, or of foreign states in amity with his Majesty; and also shall duly and truly pay, or cause to be paid, to his Majesty, or the customers or officers appointed to receive the same for his Majesty, the usual customs due to his Majesty, of and for all ships and goods so as aforesaid taken and adjudged for prize. And moreover if the said

shall not take any ship or vessel, or any goods or merchandises, belonging to the enemy, or otherwise liable to confiscation, through consent or clandestinely, or by collusion, by virtue, color, or pretence of his said letter of marque and reprisal, that then this bail shall be void and of none effect; and unless they shall so do, they do all hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum of pounds before-mentioned. And in testimony of the truth thereof they have hereunto subscribed their names.

By his Majesty's command,

PORTLAND.

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#### No. IX.

A PROCLAMATION *for granting the distribution of prizes taken from the King of Spain, or his subjects, subsequent to the 9th day of November, 1796, the date of his Majesty's order in Council for granting general reprisals against the ships and goods of the King of Spain and his subjects.*

GEORGE R.

WHEREAS, by our order in council, dated the ninth day of November last, we have ordered, That general reprisals be granted against the ships, goods,

and subjects of the king of Spain, so that as well as our fleet and ships, as also all other ships and vessels that shall be commissioned by letters of marque, or general reprisals, or otherwise, by our commissioners for executing our office of lord high admiral of Great Britain, shall and may lawfully seize all ships, vessels, and goods, belonging to the king of Spain or his subjects, or others inhabiting within any of the territories of the king of Spain, and bring the same to judgment in any of our Courts of Admiralty within our dominions. We, being desirous to give due encouragement to all our faithful subjects who may have lawfully seized any such ships, vessels, or goods, subsequent to the said ninth day of November last, or who shall hereafter seize such ships, vessels, or goods; and having declared in council our intentions concerning the distribution of all manner of captures, seizures, prizes, and reprisals, of all such ships and goods as aforesaid, which, subsequent to the said ninth day of November, 1796, have been, or hereafter, during the present hostilities, shall be seized as aforesaid, do now make known to all our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice of our privy council, that our will and pleasure is, That the neat produce of all prizes taken as aforesaid, subsequent to the said ninth day of November last, or which shall hereafter be taken as aforesaid, the right whereof is inherent in us, and our crown, be given to the takers, (save and except the produce of such prizes as are or shall be taken by ships or vessels belonging to our commissioners of customs or excise, the disposition of which we reserve to our further pleasure,) but subject to the payment of all such or the like customs and duties as the same are now, or would have been liable to, if the same were or might have been imported as merchandise; and that the same may be so given in the proportion and manner hereinafter set forth; that is to say, that all prizes taken by ships and vessels having commissions of letters of marque and reprisals, (save except such prizes as are or shall be taken by the ships or vessels belonging to our commissioners aforesaid,) may be sold and disposed of by the merchants, owners, fitters, and others, to whom such letters of marque and reprisals are granted, for their own use and benefit, after final adjudication, and not before. And we do hereby further order and direct, That the neat produce of all prizes which are or shall be taken as aforesaid by any of our ships or vessels of war, shall be for the entire benefit and encouragement of our flag-officers, captains, commanders, and other commissioned officers in our pay, and of the seamen, marines, and soldiers, on board our said ships and vessels, at the time of the capture; and that such prizes may be lawfully sold and disposed of by them and their agents, after the same shall have been to us finally adjudged lawful prize and not otherwise. The distribution shall be made as follows; the whole of the neat produce being first divided into eight equal parts.

The captain or captains of any of our said ships or vessels of war, who shall be actually on board at the taking of any prize, shall have three eighth parts; but in case any such prize shall be taken by any of our ships or vessels of war, under the command of a flag or flags, the flag-officer or officers, being actually on board, or directing and assisting in the capture, shall have one of the said three eighth parts; the said one eighth part to be paid to such flag or

flag-officers in such proportions, and subject to such regulations as are hereinafter mentioned :

The captains of marines and land forces, sea-lieutenants, and master on board, shall have one eighth part, to be equally divided amongst them ; but that every physician appointed, or hereafter to be appointed to a fleet or squadron of our ships of war, shall, in the distribution of prizes which are or shall be taken as aforesaid, by the ships in which he shall serve, or in which such ship's company shall be entitled to share, be classed with the sea-lieutenants, with respect to the said one eighth part, and be allowed to share equally with them, provided such physician be actually on board at the time of taking such prizes.

The lieutenants and quartermasters of marines, and lieutenants, ensigns, and quartermasters of land forces, secretaries of admirals or of commodores, with captains under them, boatswains, gunners, purser, carpenter, master's mates, surgeon, pilot, and chaplain, on board, shall have one eighth part, to be equally divided amongst them.

The midshipmen, captain's clerk, master-sailmaker, carpenter's mates, boatswain's mates, gunner's mates, master-at-arms, corporals, yeomen of the sheets, cockswain, quartermasters, quartermaster's mates, surgeon's mates, yeomen of the powder-room, sergeants of marines, and land forces on board, shall have one eighth part, to be equally divided amongst them.

The trumpeters, quarter-gunners, carpenter's crew, stewards, cook, armorer, steward's mate, cook's mate, gunsmith, cooper, swabber, ordinary trumpeter, barber, able seamen, ordinary seamen, and marines, and other soldiers, and other persons doing duty and assisting on board, shall have two eighth parts, to be equally divided amongst them.

Provided, That if any officer being on board any of our ships of war, at the time of taking any prize, shall have more commissions, or offices than one, such officer shall be entitled only to the share or shares of the prizes which, according to the above-mentioned distribution, shall belong to his superior commission or office. And we do hereby strictly enjoin all commanders of our ships and vessels of war taking any prize, as soon as may be, to transmit, or cause to be transmitted, to the commissioners of our navy, a true list of the names of all the officers, seamen, marines, soldiers, and others, who were actually on board our ships and vessels of war under their command at the time of the capture ; which list shall contain the quality of the service of each person on board, and be subscribed by the captain or commanding officer, and three or more of the chief officers on board. And we do hereby require and direct the commissioners of our navy, or any three or more of them, to examine, or cause to be examined, such lists by the muster books of such ships and vessels of war, and lists annexed thereto, to see that such lists do agree with the said muster books and annexed lists, as to the names, qualities, or ratings, of the officers, seamen, marines, soldiers, and others belonging to such ships and vessels of war, and upon request forthwith to grant a certificate of the truth of any list transmitted to them, to the agents nominated and appointed by the captors to take care and dispose of such prize ; and also upon application to them (the said commissioners) they

shall give, or cause to be given, to the said agents, all such lists from the muster books of any such ships of war, and annexed lists, as the said agents shall find requisite for their direction in paying the produce of such prizes, and otherwise shall be aiding and assisting to the said agents in all such matters as shall be necessary. We do hereby further will and direct, that the following regulations shall be observed concerning the one eighth part hereinbefore mentioned to be granted to the flag or flag-officers, who shall actually be on board at the taking of any prize, or shall be directing or assisting therein. First, That a flag-officer, commander-in-chief, when there is but one flag-officer upon service, shall have to his own use the said one eighth part of the prizes taken by ships and vessels under his command. Secondly, That a flag-officer, sent to command at Jamaica, or elsewhere, shall have no right to any share of prizes taken by ships or vessels employed there, before he arrives at the place to which he is sent, and actually takes upon him the command. Thirdly, That when an inferior flag-officer is sent out to reinforce a superior flag-officer at Jamaica, or elsewhere, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer before the inferior flag-officer shall arrive within the limits of the command of the superior flag-officer, and actually receive some order from him. Fourthly, That a chief flag-officer returning home from Jamaica, or elsewhere, shall have no share of the prizes taken by the ships or vessels left behind to act under another command. Fifthly, That if a flag-officer is sent to command in the outports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed from that port by order from the admiralty. Sixthly, That when more flag-officers than one serve together, the eighth part of the prizes taken by any ships or vessels of the fleet or squadron, shall be divided in the following proportions, viz.: If there be but two flag-officers, the chief shall have two third parts of the said one eighth part, and the other shall have the remaining third part; but if the number of flag-officers be more than two, the chief shall have only one half, and the other half shall be equally divided amongst the other flag-officers. Seventhly, That commodores with captains under them shall be esteemed as flag-officers, with respect to the eighth part of prizes taken, whether commanding in chief or serving under command. Eighthly, That the first captain to the admiral and commander-in-chief of our fleet, and also the first captain to our flag-officer appointed, or hereafter to be appointed, to command a fleet or squadron of twenty ships of the line of battle, and also the first captain to our flag-officer appointed, or hereafter to be appointed, to command a fleet or squadron of fifteen ships of the line of battle, (provided such last-mentioned fleet or squadron shall be composed of his Majesty's own ships,) shall be deemed and taken to be a flag-officer, and shall be entitled to a part or share of prizes as the junior flag-officer of such fleet or squadron. And we do hereby further order, That in case of cutters, schooners, and other armed vessels commanded by lieutenants, the share of such lieutenants shall be three eighth parts of the prize, unless such lieutenants shall be under the command of a flag-officer or officers; in which case the flag-officer or officers shall have one of the said three eighths, to be divided among such flag-officer or officers in the manner hereinbefore

directed in the case of captains serving under flag-officers. Secondly, We direct that the share of the master, or other person acting as second in command, and the pilot, (if there happens to be one on board,) shall be one eighth part, to be divided into three equal parts, of which two thirds shall go to the master or other person acting as second in command, and the remaining one third to the pilot; but if there is no pilot, then such eighth part to go wholly to the master or person acting as second in command. That the share of the chirurgion, or chirurgion's mate (where there is no chirurgion,) midshipman, and clerk and steward, shall be one eighth; that the share of boatswain's, gunner's, and carpenter's mates, yeomen of the sheets, sailmaker, quarter-master, and quartermaster's mate, shall be one eighth; and the share of the seamen, marines, and other persons on board, assisting in the capture, shall be two eighth parts. But it is our intention nevertheless, that the above distribution shall only extend to such captures as shall be made by any cutter, schooner, or armed vessel, without any of his Majesty's ships or vessels of war, being present or within sight of, and adding to the encouragement of the captors, and terror of the enemy. But in case any of his Majesty's ships or vessels of war shall be present, or in sight, that then the officers, pilots, petty officers, and men on board such cutters and schooners, or armed vessels, shall share in the same proportion as is allowed to persons of the like rank and denomination on board his Majesty's ships and vessels of war.

Given at our court at St. James's, the twenty-fifth day of January, one thousand seven hundred and ninety-seven, and in the thirty-seventh year of our reign.

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